EXHIBIT Z

to

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Civil Action No.: 1:10-cv-00986-JFA

Transcript from deposition of Adrienne Marting

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

MARGO J. HEIN-MUNIZ, MD, and PARKSIDE MEDICAL CONSULTANTS, LLC, d/b/a MAGNOLIA MEDICAL, Plaintiffs,
vs.
AIKEN REGIONAL MEDICAL CENTERS, UNIVERSAL HEALTH SERVICES, INC., AIKEN OBSTETRICS & GYNECOLOGY ASSOCIATES, P.A., CARLOS A. MILANES, K. D. JUSTYN, OLETHA R. MINTO, MD, JAMES F. BOEHNER, MD, ROBERT D. BOONE, MD, JONATHAN H. ANDERSON, MD, and THOMAS P. PAXTON, MD, Defendants.

CIVIL ACTION FILE
NO. 1:10-CV-00986-MBS

D E P O S I T I O N

WITNESS: ADRIENNE E. MARTING
DATE: August 12, 2011
TIME: 2:00 P.M.
LOCATION: Balch & Bingham, LLP
30 Ivan Allen, Jr., Blvd., N.W.
Suite 700
Atlanta, Georgia 30308-3036

TAKEN BY: Attorney for the Defendants

REPORTED BY: CATHERINE B. STEELE, GA CCR B-1123

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(Reporter's Note: Index at rear of transcript.)

(Whereupon, disclosure as required by the Georgia Board of Court Reporting was made by the court reporter, a written copy of which is attached hereto.)

ADRIENNE E. MARTING,
being first duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. DAYHUFF:

Q Ms. Marting, my name is Travis Dayhuff. I represent the Defendants in this action. Dr. Muniz is the Plaintiff. And I believe she has retained you in this matter; is that correct?

A That's correct.

Q All right. This deposition is being taken pursuant to the Federal Rules of Civil Procedure, so I'm required to provide you with some instructions. You may hear some objections to the form of my question today. If Mr. Dick wants to make an objection, will you pause your answer and allow him to enter that objection. The only exception would be if he instructs you not to answer, which probably won't occur since you don't have an attorney-client relationship with him.

If you don't understand my question, the Rules require you to ask me rather than Mr. Dick for

clarification before you answer. Do you understand that?

A I do.

Q If you need a break during your deposition. feel free to ask and we can take one. However, during breaks you're not to discuss the substance of your testimony with anyone. Do you understand that?

A I do.

Q All right. Generally speaking, the outline of what I'm going to go over today is we're going to discuss some preliminary matters, things like documents you've seen, what you were retained to do. I'm going to ask you a lot of questions about your background, your education, your practice of law. And then I'm going to examine you on the opinions you plan to offer at trial.

Okay. Let's start with what we have had marked as Exhibit 1.

MR. DAYHUFF: David, here is a copy.

(Whereupon, Defendant's Exhibit No. 1 was marked for identification.)

Q (By Mr. Dayhuff) Ms. Marting -- and is it Marting (pronunciation variation) or --

A Marting.

Q Marting?

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A Yes. But you can say "ting" if you want to.
Q Your receptionist adds a little flare to it.
A Oh, she adds a little punch to it?
Q But I'm going to go with Marting. Take a look at what's been marked Exhibit 1. This is a list of documents provided to me by Mr. Dick. And it was meant to list what materials you have received and reviewed in this matter. So take a moment and look at that and tell me if you have received and reviewed these documents.
A Okay.
Q And may I, while you are reviewing that, take a look at that (indicating) and see if it corresponds with this list?
A Yes.
Q And, for the record, I'm looking at a notebook called Confidential Peer Review Material, Margo Muniz, MD.
A And I think that's reflected as Second Peer Review Hearing Transcripts with Exhibits. Well, not really. I understood that to be the hearing exhibits.
MR. DAYHUFF: David, this appears to be, to me, the exhibits for the 2010 peer review hearing. Is that correct?
MR. DICK: Yeah. If you look at the Second

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Peer Review Hearing Transcript with Exhibits, that's what it is.
MR. DAYHUFF: Got you. So that's what this notebook contains?
MR. DICK: It's the notebook created by, I believe, Terri Ergle and distributed to us during the peer review hearing.
MR. DAYHUFF: Correct.
MR. DICK: Of 2010.
MR. DAYHUFF: Excellent.
Q (By Mr. Dayhuff) All right. Anything -- well, do you still need some time to scan that?
A I'm still looking. I don't know if I'm missing it, but I also have some emails that were produced in discovery.
Q Okay. If those are the e-mails, I will take a look at them and make sure I understand what you've seen.
A This is it. And I believe a lot of them were attachments to Mr. Milanes, but I just took them so I could read them and organize them.
Q Sure. These look familiar. All right, looked through the stack of emails. And I believe David told me before you came in here that you also received some additional recent Medical Staff Bylaws,

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some Board lists?
A Yes. He sent me -- they are in my email, but I haven't look at them yet.
Q All right, fair enough.
A And, yeah, we should note that, because I did see that he sent the email, but I had a crazy day yesterday.
MR. DICK: That was just for your reference, I forwarded on your email.
MR. DAYHUFF: I've got you. Yes, I know what that is.
Q (By Mr. Dayhuff) All right. We've established that you have received these documents we've been talking about which appeared on Exhibit 1. Have you been able to review all these documents?
A Not fully. I have focused most of my time on the hearing transcripts and the Medical Staff Bylaws, which I was basically familiar with the old HortySpringer ones, but that was my main focus. My associate looked at Dr. Minto's deposition and tabbed it, but I haven't had a chance to look at that, quite frankly. I have looked at the notebook of the hearing exhibits page by page.
Q Good, good.
A And I had open on my screen the Amended

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Complaint. I have thumbed through it, but I haven't read every paragraph. I was trying to focus on what I was being asked about.
Q Sure, sure. I imagine some of the stuff isn't particularly important for your opinions and some of it is; right?
A That's right.
Q Obviously, I'm here today to get the opinions that you plan to offer at trial. Do you understand that?
A I do.
Q And have you -- well, are you to the point where you can tell me what opinions you plan to offer at trial?
A I am at the point where I can tell you what my opinions are today and, based on what I have seen, I don't anticipate that they will change; but because I haven't read everything, I'd like to reserve the right to add or modify.
Q Sure. And that always happens, I guess, with experts. My only concern with that is if you modify your opinions, I would need to come back to learn about them.
A Right. We would let you know ahead of time if anything changes.

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Q And is it fair to say right now that you don't anticipate having to modify opinions materially before trial?
A That's right, that's right.
Q Good. Otherwise, of course, we might just want to go home --
A And start all over, which I really don't.
Q -- and not waste the next two and a half or three hours.
A But I hate to have all these things on a list that I haven't gone through and really digested.
Q I understand. Other than documents provided to you about the peer review action at issue or peer review actions at issue in my case, have you utilized any other materials in developing the opinions you plan to offer at trial?
A The only thing I can think of is -- well, that I was provided or that I plan to rely on?
Q Utilized or plan to rely on, sure.
A I reviewed HCQIA and the bylaws.
Q Health Care Quality Improvement Act?
A That's right.
Q And just the statute; right?
A That's right.
Q Okay. Anything else?

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A Not at this point, no.
Q And let's talk about documents, if any, you've created regarding this matter. I know you have a retainer letter.
A That's right.
Q I guess you created that (indicating), and I'll give you that which we'll mark Exhibit 2. Just, if you would, review that and --
A It looks like the one I sent out.
(Whereupon, Defendant's Exhibit No. 2 was marked for identification.)
Q (By Mr. Dayhuff) Okay. For the record, is No. 2 the retainer letter that you sent out to memorialize the agreement you have with looks like Sowell Gray, the law firm?
A Yes.
Q What were you retained to do in this case?
A As reflected on here, basically?
Q Sure. Does that differ from reality?
A Or what I was asked for? Well, I didn't know how precise you wanted me to be.
Q That's okay.
A To serve on behalf -- to serve as an expert witness on behalf of Dr. Muniz in the matter that's currently pending, Muniz, et al. versus Aiken Regional

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Medical Centers, et al., on the peer review aspects of it, the fairness of the hearing, the compliance with HCQIA, and the bylaws.
Q Fairness of the hearing, compliance with Health Care Quality Improvement Act, and what was the last one? Compliance with bylaws?
A Bylaws, yes. Technically, in this case, it's the credentialing policy.
Q Compliance with Aiken Regional Medical Center's credentialing policy?
A That's correct. But I'll probably call it the bylaws.
Q We'll note that so we'll know what we're talking about. Okay. So I was asking you what documents you created, and we've got a letter that's Exhibit 2. Have you created any other documents in this matter? Reports or drafts or --
A No.
Q -- that type of thing?
A I am not to that point yet.
Q All right. How about invoices, have you had to invoice in this case yet?
A Yes. Just sent one out on Monday, I think.
Q What's your total billing to date on this matter, estimated?

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A 6,000.
Q And about how many hours does that represent?
A Divide it by 420.
Q There you go. We can figure that out later.
MR. DAYHUFF: Unless you've got a Rain Man thing going on over there.
MR. DICK: No, no.
Q (By Mr. Dayhuff) So $6,000 at 420 an hour. And you've got an associate mixed in there too?
A Yeah, I was just trying to think if the bill that just went out reflects her time. I don't know it does, because that was August time, and that doesn't reflect August time.
Q Did you do anything to prepare for your deposition today?
A I reviewed the transcripts again. And that's all.
Q How about chat with my friend Mr. Dick?
A Well, yeah, I mean, we were sitting here.
Q Did you guys discuss any of the opinions you would offer or any of the substantive issues in this case or just small talk?
A Well, we -- I'm trying to be as accurate as possible. I was asked some questions and if I had

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reviewed this or that. So and I told him what I found. And I noted some points and I asked some questions. There's so much in here factually and there's a lot of players. You know, who is who? And actually I did a -- well, my associate created it, but I did a timeline of events really of just who the players are.

Q Okay.

A Because there's so many people.

Q Sure.

A And I was trying to pick all that out. And I will give you a copy of this if you would like.

Q And we'll make that an exhibit. Can we use that copy or --

A I can go make a copy.

Q Okay. And I don't want to stop things, I mean. If we can just make an exhibit of it, I may go back to it later. Or do you need to retain the original? I imagine it's on your word processing --

A It's on my (witness nods head up and down.)

Q So is it okay to make this 3?

A Sure.

(Whereupon, Defendants' Exhibit No. 3 was marked for identification.)

Q (By Mr. Dayhuff) Anything else you can think of that was created about this case?

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A Emails on timing of the deposition.

Q I think I probably have seen some of those.

A Yes.

Q Any emails that contain substantive discussions of issues or opinions in this case?

A No, more the passing on of documents like the minutes he just sent me.

Q Fair enough. Your meeting with David today when you were asking some questions and talking about what you had reviewed, how long did that meeting last?

A Well, we were in the room together from about 11:00 until we started, but that included lunch and I was mostly reading. So we didn't chat for that long.

Q Got you. Anything that you would consider material or important or particularly substantive that came out of your meeting with Mr. Dick?

A No.

Q Any fact you learned that was material to you that you learned from your meeting material to your opinions?

A No. It was more just to confirm who is this, you know, and get the names straight, whether people were related. There were like two Dr. Robinsons. Just little factual questions like that

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I was just brushing up on.

Q Fair enough. And I think I've asked you this, but you're prepared today to provide the opinions you will offer at the trial of this case?

A Yes, I am, subject to the reservation I stated earlier.

Q All right. And I think you've described the types of opinions you're going to offer and you described them as peer review opinions?

A That's my verbiage. That's what I consider this whole process at the hearing, the peer review hearing at the hospital.

Q And you further broke that down into three subparts: Opinions regarding the fairness of the hearing.

A Uh-huh.

Q Opinions regarding compliance with the Health Care Quality Improvement Act.

A (Witness nods head up and down.)

Q And compliance with the credentialing policy or Medical Staff Bylaws of my hospital. Correct?

A That's right.

Q Any other subsets of opinions?

A Not that I know of.

Q Fair enough. Have you before -- well, we've

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obviously talked about this meeting at 11:00 o'clock today with Mr. Dick. Have you had meetings with Mr. Dick or Mr. Sowell before this?

A We talked on the phone yesterday.

Q You, Mr. Sowell, and Mr. Dick together?

A Yes.

Q How long did that call last?

A About 45 minutes.

Q What was kind of the nature of that call? What were you discussing? This case?

A Yeah, this case. You know, various people's depositions, you know, confirming one way or another. I had some basic questions on -- oh, we went over the emails too, I think was a substantive thing that we discussed.

Q All right. How about communications with anyone other than Mr. Sowell, Mr. Dick, your associate regarding this case?

A No one else.

Q Not Dr. Muniz, for example?

A No. I have not talked to her yet.

Q All right. You're obviously ready to give your opinions in this case, subject to that qualification you mentioned. What more, if anything, do you plan to do before trial in this case?

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A Read any -- well, finish reading the depositions that were provided to me, and any additional ones that come up and the Board minutes that I haven't had a chance to look at. And then case law research just to, you know, back up.
Q All right. Let's talk about your background, education, and employment.
A Okay.
Q Let's start with your current employment.
A I am a partner at Balch & Bingham, LLC, in Atlanta, Georgia.
Q And how long have you been a partner at Balch & Bingham?
A Since December 2010.
Q And before that let's just kind of go back in time for your legal career.
A Between 2007 and December 2010 I was at Epstein, Becker & Green in the Atlanta office. And prior to that from -- I clerked in 1988. And from 1989 to 19 -- no, sorry, 2007, I was at Powell Goldstein, which is now Bryan Cave.
Q Was that in Atlanta?
A Yes, yes.
Q And you clerked in 1988?
A Uh-huh.

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Q For a judge?
A No, no, clerked at Powell Goldstein.
Q I see. '89 to 2007 at Powell Goldstein. Were you an associate there? of counsel? partner?
A I was an associate, and then I was a partner. And then our group blew up, and now they have no health care lawyers there.
Q Wow.
A It's sad.
Q Have you been doing health care law your entire legal career?
A Yes, yes.
Q Do you have any certifications in law?
A No.
Q Specialty certifications?
A No.
Q Do you have --
A Well, I did take the ABA course on hearing officers for peer review hearings, and they did give us a little certificate. But it's not like, you know, being a specialist in the Florida bar or something.
Q Like in taxation or something, okay.
A Yeah.
Q Do you have any -- well, you mentioned your ABA certification as a hearing officer. Do you have

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any other certifications related to what you've described as the peer review expertise?
A No. Just my 22 years of experience.
Q Okay. I noticed on your website that you also practice -- it looked like your practice is divided into three areas: Business litigation, corporate, and health law. Is that correct?
A I wouldn't say so, but I don't doubt that that's on my website. I think here they have the health law practice, which is under the corporate. And then they have the health care litigation. And in other firms, it's been different. I think what I do is quasi-litigation, doing a lot of the CON work and the peer review hearings. So I think of myself more as a quasi-health care litigator, to be fair.
Q Health care litigator, okay. And as a health care litigator --
A And regulatory.
Q Okay, and regulatory. And when you say regulatory, are you talking about advice --
A Yes.
Q -- on Medicare/Medicaid reimbursement issues, or advice on what?
A I've done some of that. But mostly certificate of need, licensure, and I've done EMTALA

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matters, a lot of that, and peer review. I have trained medical staffs, you know, on their yearly, when the new group comes in.
Q Okay. So you do some CON, you do some EMTALA, and you do some other regulatory. What percentage of your legal work would you say is peer review related?
A Almost 50 percent.
Q 50 percent, okay. And if we were to think about that remaining 50 percent, how much of that is CON?
A Almost, you know, like 45 percent, I would think.
Q That's a very similar practice to mine. 45 percent CON and the remaining 5 percent miscellaneous regulatory?
A Right, right.
Q And out of that 50 percent that is peer review related, I imagine we could further break that down. How much of that 50 percent is litigating peer review matters in state or federal court?
A Very little, actually. I have only had a couple of cases go to trial. Well, I -- yeah. Mostly it's at the hospital level representing either the MEC or serving as a hearing officer.

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Q So you have done internal fair hearings at the hospital level?
A That's correct.
Q And either represented the MEC or the physician under review?
A That's correct.
Q Okay. And out of that 50 percent of peer review work, how much of -- how much of that work is internal hospital litigation of peer review matters?
A The actual litigation, like going through a hearing?
Q Uh-huh.
A 30 percent, I'm guessing, you know.
Q Sure. These are rough.
A There's a lot of advising ahead of time.
Q Absolutely.
A And, hopefully, if you're good, you can make the hearing not happen.
Q Yeah.
A So I think that's a fair assessment.
Q Okay. And that leaves us about 20 percent of what? You do some -- I saw from your bio that you work on medical staff bylaws for hospitals?
A That's correct.
Q Do you ever advise physicians on the medical

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staff bylaws?
A No, I haven't, I haven't. Well, no, that's not true. Once a long, long time ago King & Spalding was representing Southeast Georgia Regional Medical Center and they -- it was a very contentious fight, and I came in and was asked to represent the physicians as a group. That was years and years ago.
Q Then I imagine the rest of that 20 percent is advice on peer review matters that doesn't result in a hearing?
A That's exactly right.
Q Okay. And that advice is both to hospitals and physicians or just hospitals?
A Both, I've represented both. Not at the same facility, obviously.
Q That would be an issue, wouldn't it?
A Yes.
Q Thinking about your peer review work, that 50 percent of your work that's peer review, give me some sense of how it breaks down along the lines of you representing and advising a hospital versus you representing and advising a physician.
A I would say that -- and I just want to be fair here -- 80 percent would be the Medical Executive Committee and 20 percent individual physicians.

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Q Do you have a stable of hospital clients, for lack of a better word, that you provide peer review services to?
A I do.
Q Can you tell me who those clients are?
A DeKalb Medical.
Q Okay.
A Both facilities. Well, they have three facilities, but the Hillandale and the main campus one.
Q Okay.
A Southern Regional Medical Center.
Q All right.
A Medical Center of Central Georgia. And, I'm sorry, ask me the question again. Are you asking who I represented when I'm representing the hospital or had any dealings with?
Q Representing the hospital or providing advice to the hospital on peer review.
A All right.
Q Or medical staff bylaws, for that matter.
A Northside Hospital. And, actually, that specific facility was Northside Hospital Cherokee. And I believe that's it.
Q DeKalb Medical Center, it has three hospital facilities, it sounded like?

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A That's correct.
Q Is that a nonprofit or for profit?
A Nonprofit.
Q So no one owns DeKalb Medical?
A Right.
Q All right. Southern Regional Medical Center, nonprofit or for profit?
A That's nonprofit. Actually, all of these are nonprofit.
Q All are nonprofit. So there's no owner of any of these that we would need to discuss?
A That's right. They're all reorganized hospital authorities.
Q Okay. Are any of them public any longer?
A No.
Q They were apparently in the past when they were hospital authorities?
A Exactly, when they were hospital authorities, but none of them are now. And that's been years.
Q Okay. Then out of that list that includes both folks you advise on the -- or includes folks you advise on medical staff bylaws, it includes hospitals where you have represented the MEC.
A Uh-huh.

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Q And hospitals where you have provided other general peer review advice. Is that accurate?
A Yes.
Q Okay. You mentioned your hearing officer training, that you are trained as a hearing officer, I guess, and that you have helped train other medical staff members to be hearing officers. Did I go too far with that?
A No. I ran things together. I attended a conference put on by the American Bar Association for hearing officers and, you know, training them. Funny thing was I had already been a hearing officer before I went there, but I thought it would be a good idea to hone up on my skills.
Q Sure, sure.
A But what I was talking about with the teaching was just when the new medical staff officers come in, I have done training for them, you know, a day conference where we'd come in. I actually did it jointly with the HortySpringer folks where we talked about the bylaws and their duties and confidentiality and the importance of all that.
Q The ABA hearing officer training that you went to, when was that?
A More than three years ago and less than six,

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the best I can do with a guess.
Q And did they provide you with written materials?
A Yes.
Q And was this done by the ABA Health Law Section?
A Yes.
Q And was it done at any particular location?
A It was in Chicago.
Q Chicago, okay. And were there any particular lawyers or folks that headed it up that you recall? You know, the primary teacher or --
A I'm trying to think. No. I knew some of the audience members who had been hearing officers in some of my cases.
Q And I was going to ask, your hearing officer work, how often have you been a hearing officer in peer review.
A Only once.
Q Once, okay. And was that for one of your hospitals you've listed?
A Yes, Southern Regional.
Q All right. And you were a hearing officer for Southern Regional, and were they also a client of yours at that time?

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A Of my partner's.
Q Okay.
A Yes.
Q So there was a --
A So, yes, they were.
Q Okay. And did your partner represent the MEC in that matter?
A No, no. We wouldn't do that. That's totally inappropriate.
Q That's not good.
A No.
Q Okay. How did you come to be the hearing officer in that one? Did your partner recommend you?
A Yes. I'm trying to think. David Winkle, now your former -- or your current partner.
Q I'll just ask David.
A That's right. David Winkle is like general outside counsel for Southern Regional.
Q And did the physician's counsel or the physician object to the service of a member of a firm that represented the hospital as the hearing officer?
A No, they did not. But that was made clear to everybody.
Q Sure. Let's talk about expert witness experience you have, if any. Since this is your first

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deposition, maybe this is your first expert witness experience. Have you ever been retained to offer peer review opinions before?
A Yes, one time, for South Georgia Medical Center in Valdosta.
Q Tell me about that.
A And I wasn't deposed. It was while I was at Epstein, Becker & Green, so it was between 2007 and 2010, sometime in that time frame. David Winkle was the one who put me in touch with the attorney. He said I've done more peer review hearings than anybody he knows.
Q Okay.
A And I wrote a report. And I looked for that report, and I don't have a copy of it. And we submitted it. And then the matter was -- I believe it was resolved, because we were never deposed and I never had to do anything else.
Q Okay. So it presumably settled, then, do you think?
A I believe so, I believe so.
Q I guess the other alternative was it was dismissed. But you don't recall that?
A No, I do not recall that. All I know is my services were no longer required, that it didn't

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proceed to trial.
Q And were you representing -- were you offering opinions -- were you retained by the physician or the hospital in that case to offer opinions, or the hospital's counsel or the physician's counsel?
A I'm hesitating because I believe it was -- I can't think of the name of the attorney, but the hospital's counsel. It wasn't in-house counsel, it was outside counsel.
Q So you were offering peer review opinions, for lack of a better word, defending the peer review action process at South General -- South Georgia --
A South Georgia Medical Center, I believe is the name of it.
Q Do you remember any of the major issues in that case?
A No.
Q Not a single one?
A And I looked for the report. And now I'm not even positive that I -- the fact I can't remember anything, I wonder if I even did a report, you know what I mean. But I remember being asked to do it. And I don't have a copy of that report because it was at a different firm.
Q Sure, sure.

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A But I don't know the issues, quite frankly.
Q Fair enough. Other than your service as an expert witness offering expert opinions for South Georgia Medical Center, any other work that you've had offering expert opinions other than this case?
A To my husband all the time. No, no.
Q Expert opinions (indicating).
A Right.
MR. DAYHUFF: Does that show up when I do that (indicating)?
THE COURT REPORTER: Sort of.
Q (By Mr. Dayhuff) So two cases as an expert witness, all right. Have you ever been retained to offer expert opinions to be used in litigation in other subject matter areas?
A No.
Q Have you ever been qualified as an expert in peer review by any court?
A No. I've gotten a lot of experts qualified, but I haven't been on the other side.
Q And you've never been qualified in any other subject matter by any court?
A That's correct.
Q We talked about the relevant area for your opinions today being peer review. Have you published

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any in the peer review field?
A The most recent thing --
Q I didn't see it on your website.
A No. And I have a list from my old firm. I mean, I don't have it, but I know it once existed. I have done a number of client alerts and those type things that were circulated, but I haven't published anything. Some of my partners write books, but I have not done that.
Q Let me take a look at something here. One of the things that I'm to get either in writing or from you as an expert witness under the Federal Rules is a list of cases during the previous four years in which you have testified as an expert or by deposition. And we've got the cases. You mentioned the one.
A Right.
Q A list of publications authored in the previous ten years, I'd be interested in that. Will you be able to obtain that?
A I might be. I mean, specifically related to peer review and that type of thing or any topic, any health care topic?
Q I'll take any topic, I guess. Obviously, I'm looking more closely at the peer review.
A Uh-huh. The only thing that's even closely

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related to anything here was the revision, the Joint Commission revision of the bylaws, medical staff bylaws.
Q Maybe that's the way to go. If I understand your testimony, then, you have published one item that relates to your peer review expertise. And it is, for the record, tell me again.
A Related to the revision to the bylaws standards, Joint Commission standards.
Q All right.
A MS.01.01.01. There's points in between there.
Q And, for the record, tell us what the Joint Commission MS.01.01 revision is about.
A Well, it was a big stink. Did you follow all of that? Where they said you -- well, let me back up. Several years ago a lot of hospitals, based on one primary provider, and this is my belief, took their bylaws and broke them out into various policies. And I think Aiken has the same thing where they have a credentialing policy. And the Joint Commission came out and said, no, you have to have all the substantive matters in one in your bylaws. And the American Health lawyers and a bunch of people threw a fit. And they went around and around a few times. And they backed

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off a little bit and they kind of refined, and so now it's not as onerous as it once was. The way it initially came out, everybody thought they were going to have to immediately do a massive rewrite of their bylaws, and now they have softened that somewhat.

Q And your publication took what angle on this?

A The one that I think it was on is when it first came out and talked about what it was going to do. Then it changed later somewhat.

Q All right. And was that in the form of a client alert or an article somewhere or --

A A client alert.

Q A client alert?

A And I was at Epstein, Becker & Green at the time.

Q All right. Then that should cover your publications that are related, and so don't worry about collecting the others.

A Right. And just so you know, I've done a couple since I've been here. One is pending in the Atlanta Hospital News, but they are on other regulatory issues, like home health and --

Q The only thing I'm really interested in is something related to your opinions or on peer review.

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A Right.

Q And we've got the statement on the compensation to be paid. How much more work on an hourly basis do you think is left, assuming you don't have to testify at trial?

MR. DICK: Do we get to hold her to this?

MR. DAYHUFF: Yeah. I'm making you budget in front of your client.

A It depends on the extent that a written report is done.

Q (By Mr. Dayhuff) If a written report is required, there would be several more hours to do that?

A Yes.

Q And if there's not one?

A Then I don't think there would be a lot more.

Q Is it fair to say you're 95 percent through if there's not a written report requirement?

A Well, the only reason I hesitate is I don't know what else will be given to me, you know what I mean?

Q Sure. Assuming you get nothing else.

A If I get nothing else, yeah, I would say I'm almost finished.

Q Excellent. Okay, enough of the rules. You

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mentioned doing a lot of peer review hearings, internal hearings at hospitals. What's a lot? How many have you done, roughly?

A Oh, somewhere between 25 and 35.

Q Wow, you have done a lot. And I probably asked you this, but what percent of those were for the MEC versus physician work?

A For the hearings -- oh, I forgot one. No, that was on the physician side. Never mind. I think almost 85 percent on the MEC side.

Q Have you taught in this expert area, that being peer review, anywhere at any time?

A Outside of my firm? Or, you know, the medical staff, you know, to hospitals, I have.

Q All right. And you mentioned that to me. So you provide an orientation service to new MEC members? board members? both?

A Both. Credentialing, MEC, all of those.

Q And is that focused on peer review or is it more broad?

A Peer review and credentialing, the whole process, and following the bylaws.

Q And you've done that a lot over the years?

A A couple of times.

Q Couple of times?

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A They have used my materials again.

Q Okay.

A You know, they don't do it all the time.

Q All right. And the materials that you provide to a board, I imagine you have a set of materials --

A Right.

Q -- that you provide over and over again to various boards?

A Well, not boards, but it was to the MEC or the -- you know, not MEC, the medical staff is the more correct term.

Q All right. I would be interested in seeing those --

A Okay.

Q -- at some point. How voluminous are these?

A There's a notebook that we put together that is (indicating). And I'll just get it for you.

Q What's its title?

A I don't know.

Q Adrienne's Secrets to the Medical Staff?

A Well, no, because it was combined. It was the HortySpringer folks, Paul Verardi. And he went over globally the peer review stuff, and I went over the specifics of this hospital, these bylaws.

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Q Got you.
A How to act, how to proceed, things to do.
Q And the two times you've done this, was it both times in conjunction with the HortySpringer attorney?
A No.
Q No? One time on your own, one time with him?
A Well, I've just done in-house things with my own associates and stuff.
Q Okay. You've also taught some peer review concepts to associates?
A Right.
Q Was that like day-to-day teaching with like my associate working with me type stuff or are you talking about formal presentations or what?
A Definite day to day. And I'm trying to think. At Powell Goldstein we used to have a lot of more formal. I'm trying to think if I did one specifically on peer review. Maybe once. I've trained a few associates, so ...
Q Do you consider yourself an expert in the field of peer review?
A Yes. Experiences and seeing a wide, wide, wide variety of things, then yes. Certainly more than

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anybody else I can think of.
Q And we've walked through some of your experience. You've talked to me about your legal work on behalf of the hospital and physicians.
A (Witness nods head up and down.)
Q Is there anything other than your legal work on behalf of hospitals and physicians that has made you an expert in peer review? Sounds like that's what it is.
A Yeah, yeah, I believe that's correct.
Q Okay.
A And you did not -- and I don't know if this is important to you, but you asked about the hospitals that I've --
Q Worked for?
A -- worked for on the MEC side. I didn't know if you wanted the --
Q The hospitals you've worked against?
A Right.
Q Sure, why not.
A I mean, just because it's reviewing different bylaws and procedures.
Q Sure, sure, that's fine. I would like to know. That should be a shorter list.
A And I don't know if this is a comprehensive

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list. Well, no, because most of these four main clients, they're also my CON clients, the ones I gave you. I've done numerous hearings for each of them. The other ones, these are all one-timers.
Q Got you.
A Piedmont Fayette Hospital.
Q And one-timers, you've done a hearing for them?
A A hearing, yeah.
Q And it could be on the physician side or --
A No, no. These are only the physician side.
Q Okay.
A I gave you all of the --
Q Only hospital side?
A No, only physician side.
Q Physician side, okay.
A I gave you the hospitals that I represented the Medical Executive Committee. You did not ask about the physicians.
Q Good. Let me have the physicians.
A Just so it's clear.
Q Yeah.
A Piedmont Fayette. St. Joe's. And both of these are in Atlanta. There's a hospital in Kansas that I can't think of the name of.

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Q Good grief, you went all the way out to Kansas?
A Southeast Georgia. And one of the HCA hospitals in the middle of Georgia off of I-20. Do you know what that is? It's in a little bitty town between here and there.
Q Jeff Baxter would have known.
A Exactly. All I remember is there was a lot of bugs on my windshield. And that may be it.
Q And those four were working for a physician?
A Right.
Q Good.
A And that went all the way through, completed the hearing.
Q All right. Do you know of any nationally known experts in the peer review field that you would look to and say, hey, that guy or girl is an expert in peer review?
A Not that I could name. I've read a fair amount of materials, and I see names that are familiar; but I did not read those to prepare for this, so I don't want to list anybody's name.
Q How about Hugh Greeley, have you ever heard of him?
A Oh, yeah. We have used their bylaws. I've

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worked with hospitals who have used them.
Q Would you say he's a nationally recognized expert in peer review?
A Yeah, I would say that.
Q All right.
A I also used -- well, that's expert witnesses -- I mean, physicians. Never mind. I was going to say I'm familiar with the Allmed folks. I have had hospitals who have used those before.
Q Allmed for their reviews of medical records?
A Right, right. But you were thinking more --
Q I was thinking more peer review experts rather than experts on medical issues.
A Exactly.
Q When you represented a physician in those four matters you talked to me about, did you retain a peer review expert?
A No.
Q I guess they were internal hearings?
A No, these were internal hearings, so they weren't in court, no.
Q And you had a couple of court matters?
A Uh-huh.
Q In your couple of court matters, have you ever retained a peer review expert to offer opinions?

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A I'm thinking, because the one that I'm thinking of that went to litigation went to federal court. And this was in Macon. It was a peer review matter that went like four rounds. And I'm not sure that by the time it got to federal court it was solely on the peer review part of it. So, no, we did not have a peer review expert.
Q Okay. And there were two cases, I guess, that made it to court. Do you remember the names of those cases or any of the parties?
A Yeah. One was the Medical Center of Central Georgia. And I know the other one, I know the physician's name, but I had rather not -- well, I guess he filed a lawsuit. It was Nwosu, N-w-o-s-u, I believe, Dr. Nwosu.
Q And you don't remember the hospital on that one?
A Yeah, Medical Center of Georgia.
Q Oh, okay. And the other case or --
A I think that one went to court two different times, is what I meant to say.
Q All right. And when was the last time it was in court?
A That was in the '90s.
Q So a long time ago.

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A Yeah, a long time ago. I got better and I kept them out of court.
Q How did that one resolve, unless it's confidential?
A Medical Center won repeatedly.
Q Did you get summary judgment or did it go to trial?
A Summary judgment.
Q Was the summary judgment based on the Health Care Quality Improvement Act?
A No, because by the time it went to court, it was on related contractual issues.
Q Got you.
A And it was a -- there was a preliminary injunction, and then it went up, and then we won on summary judgment. But it had all started from a peer review.
Q I got you. And I imagine there are reported opinions on this thing out there; right?
A Should be.
Q If it's gone up and down and back four times.
A Yeah. It was just at the District Court level. It didn't go up higher than that.
Q I got you.

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A And when I say up and down, it started in an interior hearing in the hospital, went up to the board, went back down, went to court, came back, went back to court. So it was my associate-to-partner litigation.
Q I'll bet, I'll bet. Did you represent the MEC in that case?
A Yes, yes.
Q Then you also represented the hospital during the case. Do you remember the main issues in that one that were kicking around? Was this physician suspended or revoked?
A I don't remember that part of it as much. The controversial part of it was that a new criteria regarding board certification was approved by the Board and the impact that it had. And so that was -- that went around and around.
Q So really that one doesn't sound like the Health Care Quality Improvement Act would have been an issue?
A Well, it had at the peer review part, at the medical staff part before it went (indicating). The litigation, it was kind of bifurcated, I guess. It had an antitrust claim and contractual issues, so far as I remember.
Q Okay. And I guess I was thinking if it was

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a change in the bylaws to require board certification or something --
A Yeah.
Q -- that there wouldn't have been -- but it sounds like there must have been a quality of care issue swirling around that resulted in a peer review action internally at the hospital?
A Yes, yes.
Q So there were a couple of -- that change in the bylaws issue was coupled with kind of a traditional peer review issue?
A That's correct.
Q Okay.
A Best of my recollection.
Q And how was the traditional peer review issue resolved? Was it settled? Was HCQIA applied to end that part of the case, or do you recall? And I can, obviously, look it up, I know.
A And, I'm sorry, I'm trying to remember and state it accurately. To the extent there was peer review involved, I mean, it was just applied and how we apply it in every hearing. I don't know that it was litigated separately, you know.
Q Okay.
A And I'm kind of fuzzy on those details.

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Q That's fine. I'll look it up. Are there principles and methods -- well, are there principles that are applied by you in this expert field?
A Yes.
Q What are those principles?
A Well, the way I proceed is first I read the bylaws. Then I take another quick look at the Health Care Quality Improvement Act again. And I look at the decisions.
Q Decisions of the peer review body?
A Right.
Q Okay.
A Just to get -- because that's kind of a summary of how it got to where it was.
Q Sure.
A And then the correspondence that led up to it. And then, most importantly, the hearing transcripts, how it proceeded.
Q So those are the keys, the decision of the body, the correspondence, and the hearing transcripts are the key elements of the peer review action that you analyze?
A Well, that's how I start.
Q Okay.
A But like in this one, I think some of the

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information that also bolsters my opinion are the emails, the -- well, all of the exhibits to the hearing. Obviously, that went in with the transcripts.
Q Got you.
A And the subsequent depositions that I have read.
Q And we'll hit everything that's important to you in this case. Let me step back. When I asked you the question a little inartfully about principles, I think the first two got at what I was getting at. Are there standards that you're applying to the peer review action that you're looking at when you're analyzing --
A I see what you mean now.
Q And you mentioned the bylaws.
A The bylaws and the Health Care Quality Improvement Act.
Q Any other standards that you would look to to see whether the peer review action complied with?
A More of my understanding of case law on what's considered a fair hearing.
Q And in that case law about what's a fair hearing and what's not, what is the standard or principle that those cases are applying?
A Well, they're applying the Health Care Quality Improvement Act.

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Q Anything else?
A No.
Q I just want to kind of understand the measuring stick that you're using.
A Right, right.
Q Okay. What is the purpose of the peer review system in your opinion?
A To ensure that -- to improve quality of care and to allow physicians to openly review each other and the hospitals to act accordingly.
Q And I understand the first two. I don't understand the last one.
A Well, it goes up through the hospital and the hospital has to, you know, help with the whole process of peer review. You know, have the hearing, it goes up to the Board, and the Board is the one who is ultimately responsible.
Q Got you. What is the purpose of the Health Care Quality Improvement Act?
A To, as I see it, to provide immunity to peer review participants so that physicians will monitor each other without fear of liability. Everybody can be sued, but the issue of liability.
Q Yes, they can. The purpose of the Health Care Quality Improvement Act is to immunize peer

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reviewers that participate --
A And the -- I'm sorry.
Q Go ahead.
A The reporting part of it too.
Q And that's the National Practitioner Data Bank element?
A That's correct.
Q Which we'll refer to as the NPDB; is that okay?
A That's correct.
Q What's the purpose of the NPDB component of the Health Care Quality Improvement Act?
A It's so other hospitals and entities in state or out of state can review a physician's background if there's been any corrective action. And the problem with it, it was a good idea, but the problem with it is hospitals -- and this is my opinion.
Q That's what we're here for.
A Is that instead of just working towards improving quality of care, it's so damaging to a physician's practice that it's kind of lost its value, you know. Well, maybe not lost its value if somebody is really, really horrible and they've been kicked off multiple staffs after a fair hearing. That might be something you would want to know. But politics and

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hospitals and things often cause problems and other reasons to have somebody take action against somebody. And it can be more damaging.
Say, you know, a lot of times peer review, I've had cases where they have gone up and this one physician was using a new procedure, and so the physicians on the hospital were like, well, we've never seen this, so he must be outside the standard of care. And throughout the hearing process they had more experts come in and testify. And the MEC learned things, the physician learned things, how to better document so his cases won't be thrown out.
Q Uh-huh.
A So, you know, that's the goal of HCQIA and the whole peer review process, is to improve the quality of care. What it's turned into is damaging physician's care way above what it was originally intended to do.
Q All right. And you mentioned that the NPDB has damaged physicians more than it was intended to do. Sounds like you also have a similar opinion with respect to HCQIA or not? Does your opinion carry over into HCQIA, into other parts of HCQIA?
A No, no. I think HCQIA is very important. Without it, we wouldn't have physicians monitoring

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physicians, and that's of utmost importance. I think it's -- really, I have no qualms with that.
I don't have any problem with the National Practitioner Data Bank. I think it's a good principle. What I have some issue with is how it's being used. Instead of saying, yeah, this physician had an issue and we should dig into it before we credential that physician, it's almost that a lot of hospitals say that if you have anything, we're not going to even look at you. And that kind of goes against the whole point, because then people or hospitals won't take action. And physicians, when you have them on your panels, often think, you know, the first question they ask is is this reportable to the Data Bank.
Q Sure, sure. And let me push that just a little bit further. Would you advocate for reform of the current NPDB system? It sounds like --
A No, no.
Q Sounds like you're really more concerned with how people are using it rather than the legislation itself?
A That's exactly right. I have no problem with the legislation. I just -- it concerns me that the whole point behind it, to improve quality of care, isn't getting the benefit of what was intended.

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Q Got you. All right. I'm about to ask you about your actual opinions in this case. And I'm going to get myself some water or coffee, so do you guys want to take a few minutes?
A Yes, sure.
MR. DICK: Yes.
(Whereupon, a recess was taken from approximately 3:05 P.M. until 3:15 P.M.)
MR. DAYHUFF: Let's go back on the record.
Q (By Mr. Dayhuff) Okay. I think the easiest way to do this would be for you to give me a general kind of bullet point list of your opinions without a whole lot of detail the first time through, and then I can go back. Then I will get an understanding of what I have to deal with.
A Okay. I was wondering how we were going to do this. Okay.
Q So give me a bullet point listing of the opinions you plan to offer at the trial of this case. Let's go.
A I'm trying to be concise. It is my opinion after reviewing all of the materials and with my understanding and experience in peer review matters that Dr. Muniz did not obtain a fair hearing, that there were procedural flaws and indications, strong

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indications of bias early on and throughout the hearing. And just from my experience being on both sides, you know, for the MEC and individual physicians, to me it looks like the decision was made to get rid of this doctor and they weren't going to stop until she was gone.

And that's -- I did not look at very much of the original hearing. I think I may have read the decision.

THE WITNESS: Did you give me that?

A (Continuing) I know there was a -- you know, the correspondence in here talks about it in the hearing exhibits. But from that point on, I think it was clear that they didn't want this physician here and it really didn't matter what the facts were.

Q All right. It sounds like, then, two main opinion areas, if you will, the first one being there wasn't a fair hearing because of procedural flaws and bias; and, part two, that you have an opinion that this -- that there was a decision made to get rid of her. And I don't know how to describe that.

A Regardless of the facts, a predetermined decision.

Q Regardless of the facts, okay.

A You're supposed to have an investigation and

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a recommendation and a hearing on that recommendation to further flesh out the facts.

Q Is that fair, that those are the two areas we need to discuss? And I know there will be lots of little subparts, I assume, in the first and maybe in the second.

A Yeah. And if you look at the evidence, the actual evidence, the weight of the evidence, I believe the reasonable conclusion is that the recommendation was arbitrary and capricious.

Q The 2010 recommendation?

A Yes.

Q And that's the MEC's recommendation, the Board recommendation?

A The MEC's. And didn't the hearing panel just adopt it? I will have to look at that again to be sure.

Q Okay.

A Yeah, the final decision to terminate her privileges.

Q And, obviously, for each opinion you're going to offer any subopinion that flows from the main opinion. And I want to know what evidence supports that opinion, some of the stuff that you've looked at, experiences you have had, whatever.

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A Okay.

Q So that's kind of the way I will go about that. So let's start with the opinion that the fair hearing was not fair, it had procedural flaws. Why don't you list the procedural flaws that you believe affected the hearing.

A I believe the notice was faulty.

Q And, I'm sorry, for the record, we have had two fair hearings involving Dr. Muniz.

A And all of this is the second hearing.

Q 2010?

A 2010.

Q Maybe this will shortcut things. Are you going to offer any opinions at all about the 2009 fair hearing?

A Can I consult with my counsel? I don't think so, but I don't want to -- you know, I don't know how much --

MR. DICK: I mean, I think, you know, we addressed that in the Complaint in not nearly as much depth as the 2010. I think there were still some issues.

THE WITNESS: More the result.

MR. DICK: I mean, it flows over a little bit just in maybe more the result and its use in

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the 2010. You know, it's --

MR. DAYHUFF: Well, let me ask her this question then.

Q (By Mr. Dayhuff) It doesn't sound like you have engaged in any detailed or thorough analysis of the process in 2009; is that accurate?

A That's correct.

Q The peer review process.

A Right. I've only seen the decision of the MEC, I believe, and then how it was modified by the Board.

Q Okay.

A Okay. So that's the extent I would opine on anything on that.

Q Okay. And the 2010 peer review process you've looked at with a little more care and thoroughness?

A Exactly. I've read the transcripts and looked at all the exhibits and read depositions about the people who participated, so ...

Q All right. Do you have any opinions about alleged procedural flaws in the 2009 peer review process?

A I have not really focused on that. That's why I'm thinking.

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Q I understand the idea that you're going to -- that you have looked at the result.
A Right.
Q And I understand the idea that you've analyzed with some care the process in 2010.
A (Witness nods head up and down.)
Q It would seem to me that if you have not analyzed with some care the process of 2009, you do not have any, could not have any opinions about the 2009 process. And we can certainly talk about the result, I guess, if you want.
A Right. And I guess it's where do we draw the line? I don't want to forego talking about anything. The concern there, I believe, was that the Board took a different tack. You know, the MEC, after the full-blown hearing, they looked at the cases and said there wasn't credible evidence to support the recommendation of termination of her privileges.
Q Okay.
A Okay. Then the Board, it went up the appellate review to the Board, and the Board said, yeah, but she's disruptive and let's get her a psych evaluation.
Q Okay.
A Then when that psych evaluation came back

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favorable, no one from the hospital provided that to her even though that was part of the process. And as I understand it, there was objection to all of that. But then she relented and said, fine, I will just go get the evaluation done. And she came out fine.
Q Okay. So that's your understanding of the facts of 2009?
A Right.
Q Do you have any opinions you want to offer me that you're going to offer at trial regarding that process? And you don't have to have opinions regarding that process, but I just want to make sure that I'm not surprised by --
A Right, right.
Q -- you saying to me, for example, well, the notice in 2009 was an issue or, you know, the way they cross-examined somebody.
A No, not at the actual trial, the hearing part of it, no, because I have not analyzed that. I have not read the transcripts. And the only reason I hedge a little bit is the fact that there was found to be no credible evidence and then the Board took a completely different tack. I think that starts off the -- you know, that by itself wouldn't be a problem; but if you look at all of the evidence in total, it shows a

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bias and a determination to get rid of this person.
Q Which you think manifested itself in 2010, what happened in 2010?
A That's right. I think it started there, yes.
Q All right. So it sounds to me, then, to the extent you have -- well, it's really not an expert opinion, but it's the 2009 matter is evidence, the result of the 2009 matter is evidence that you will cite to for your opinion that the 2010 peer review process was motivated by something other than quality of care and appropriate peer review considerations; is that fair?
A I like that.
Q Sounded good, didn't it?
A Write that down. That's exactly right.
Q So, then, in other words, there are no expert opinions, expert peer review opinions, about the 2009 peer review process that you are prepared to offer me today?
A I don't think --
THE WITNESS: Can you read that back?
Can I ask her to do that?
MR. DAYHUFF: I'll just ask it again.
Q (By Mr. Dayhuff) You have no expert peer

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review opinions about the 2009 peer review process at my hospital that you're going to offer at trial?
A Not more than what I have stated.
Q Okay. And what you've stated to me that I restated for you is that you looked to the result of 2009 as some evidence of animous or evidence of improper motivation that then manifested itself through the 2010 peer review? Is that a fair characterization?
A That I'm willing or ready or prepared to give an opinion on now. And the only reason I cloud that up a little bit is that I know that there were some issues that making -- asking Dr. Muniz to submit to a psych evaluation was inappropriate, but then they said, okay, we'll do that. So I don't want you to think that I think that that was fully appropriate or that I'm making an opinion on that one way or another. Okay?
Q Okay.
A But what you stated was for the purposes of this case, talking about the 2010 hearing, I'll use the result of the 2008 hearing or '9.
Q And all I'm trying to do today is understand what opinions you're going to offer at trial.
A Right, right.
Q So to the extent you're going to offer an

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opinion about the psych evaluation and the appropriateness thereof and whatever, I need to hear about that today. If you're not, that's fine.

A I don't think I will.

Q Good.

A I didn't want you to take my answer as there are no problems with the first hearing.

Q Understood. And you don't know because you haven't analyzed it thoroughly; is that correct?

A That's fair.

Q Excellent. There goes 2009.

MR. DICK: Well, I wouldn't say that.

Q (By Mr. Dayhuff) And we'll talk about how you used the results.

A (Witness nods head up and down.)

Q Let's get into your critique, your criticisms, your opinions regarding the 2010 process and why it was procedurally flawed. Let's go there.

A I believe the notice was inappropriate.

Q That's right, we started with the notice and then jumped back to 2009. Okay, the notice is inappropriate. Anything else? And I'll analyze that in more detail in a minute.

A Yes. The hearing officer, I believe, grossly overstepped his bounds. I think he may have

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been confused in what his role was, frankly.

Q All right. Problem with the hearing officer, the notice, and anything else?

A With the hearing officer there is some subparts in that to the extent that he cross-examined witnesses as if he were the attorney for the MEC.

Q Okay.

A The extent he had ex parte communications with the MEC's counsel. And I know that, you know, it's normal to talk to the medical staff officer to coordinate with the panel, you know, and get this draft to them, but not to talk to one party, one attorney for one party and not the other at the same time. I just think that's grossly inappropriate.

Q Okay.

A And it shows either ignorance of the process or bias.

Then allowing witnesses to testify, allowing the mother to testify without notice. It's not like they didn't know the mother existed. They could have had her on the list well in advance.

The extent that you had individuals who were both Dr. Muniz's competitors taking an active role in both the prosecution of the case and then voting on the ultimate decision of the case or participating in the

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deliberations thereof.

Q Okay.

A Another concern that shows bias, the unfairness of the process, is the lack of any attempt to make any -- to take any intermediate actions. These bylaws include -- and I know it's not mandatory -- but they specifically include collegial intervention. They also -- you know, there's a number of steps that can be taken prior to the harshest step of precautionary -- or summary suspension, is what it turned out to be, meaning she lost her privileges even before the hearing process was completed after they had gotten reports from experts that were favorable.

Q Okay.

A If the true intent was to rehabilitate this physician, they were a number of steps that could have been taken. Send her off for additional training, have her monitored, have her, you know, even voluntarily, a consultation, which would be reportable, but it's less than losing your livelihood. Additional education, proctoring, reprimand, or all sorts of intermediate steps. And none of those appeared to be considered.

Q Okay. Anything else? And we're talking about --

A Procedurally, yeah.

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Q -- why this hearing wasn't fair.

A Then if you just objectively look at the evidence, the hospital's Medical Executive Committee's witnesses, basically the summary suspension was brought on one case. And I had the number for it, but the one case with the fetal demise. And the experts for the Medical Executive Committee, if you look at their testimony in a whole, none of them really had a problem with her, Dr. Muniz's, doing an ultrasound before she took any action. Some of them said, well, maybe I wouldn't and maybe I would, some said I would have done sooner rather than later, but every single one of them opined that it was a complex case and that it was really a judgment call.

The testimony throughout, and even in the decision, I believe, they say there is a two-hour delay. That's their mantra all throughout. And the evidence is really clear there was not a two-hour delay. The lady was in the hospital for about two hours by the time she came in and then the delivery, but it wasn't two hours of delay between getting the C-section.

And we can go into more detail, and I will think of them as we go, but that's the high points.

Q Okay. So I've got the notice, and we'll

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pull out the notice and look at it; the hearing officer overstepped his bounds; the mother testifying, the competitors acting as prosecutors and voting and/or deliberating; a lack of actions short of suspension, intermediate actions. And I've got --

A Oh, sorry. Well, go ahead.

Q Did we miss one?

A Yes. With respect to -- with respect to the hearing officer's misdeeds, it appears from the record that the hearing officer rewrote, corrected the decision of the hearing panel, and then circulated it to the panel members instead of vice versa. And we can talk about that also. And how you can make a decision harsher than it originally was when you change the burden of proof in a way that's more favorable to the affected physician, I don't understand.

Q All right. Let's start with the first one, with the notice.

A Sure.

Q And I'm sure I've got a notice somewhere. Let's see. Now, in 2010, there is a March 16th, 2010 Notice of Adverse Recommendation/Right to Request a Hearing. Then there's a subsequent notice that comes out and provides more detail and a list of witnesses. Which notice are we talking about. Both? Either?

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A Well, I think it's important to look at them all in total.

Q Then let's mark them. I will pull out one of each.

A The precautionary suspension, the notice of adverse action, and then the notice of hearing.

Q And do you have problems with the Notice of Precautionary Suspension?

A No. Actually, that's what was open in my notebook. Let me see.

Q Where should I start to understand your opinions. March 16th?

A Well, no, I think to understand it all you do need the February 25th, which is the Notice of Precautionary Suspension.

MR. DAYHUFF: Would you mark this, please.

(Whereupon, Defendant's Exhibit No. 4 was marked for identification.)

Q (By Mr. Dayhuff) And I know you have got your own little set. And does your set you're looking at --

A It matches.

Q -- match?

A Perfectly.

Q All right. What, if anything, in this

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letter, this notice of suspension, do you find fault with?

A I don't find fault with this particular notice or -- well, it is a Notice of Precautionary Suspension. Why I say it's relevant to why the notice overall for this hearing was faulty is that it's real clear that what prompted this second peer review action, the 2010 peer review action, was the case that's listed in here, the 227589 case, one case.

Q Okay.

A Nothing else is discussed. And let's see. The verbiage that they used, you gave inappropriate medication, treatment was delayed for two hours, that's completely contrary to the facts. And they had the chart with them, and they could have looked at the chart ahead of time. And I know this is early on. But failed to recognize an emergent situation is factually incorrect. But if you look at this, it's based on one, on this case.

Q So there's nothing technically wrong with the Notice of Precautionary Suspension dated February 25, 2010?

A I don't believe so, no.

Q All right. So it comports with the bylaws of the Medical Center and the Health Care Quality

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Improvement Act and any other standards you would use to measure it?

A I believe that's correct.

Q Okay. Let's move on to --

A March 16th.

Q I have it somewhere. Just a minute.

A Do you want mine? I have a copy. I think I have two copies.

Q If you do, that will be helpful.

A Just to move things along.

Q Well, I've got it. I'm sorry. It's right in front of me.

A Okay.

(Whereupon, Defendant's Exhibit No. 5 was marked for identification.)

Q (By Mr. Dayhuff) Let's move on to March 16, 2010. And my first question is is there anything technically insufficient about the March 16, 2010 Notice of Adverse Recommendation. And when I say technically insufficient, is there anything wrong with it with respect to compliance with the bylaws or any other standard you would use in measuring this notice?

A No. But I just want to note that the grounds listed are the exact same ones that were --

Q That were in the Notice of Precautionary

Suspension?
A Yeah. Actually, where are they?
Q In the third paragraph?
A No. Yeah, you're right, I'm sorry. I was skipping over that going where in the heck is it. Yes.
Q And I want to make sure I understand the opinion you offered about the -- I mean, I understand that they mention one case in the first notice. You dispute, it sounds like, the facts of what they're saying in the notice, sounds like?
A Yes. I don't think that's necessarily a procedural issue, to answer your question.
Q I understand. It's a separate question.
A But having read the transcript, I can't help but note that that's just flat wrong.
Q All right. This is my question. An opinion about whether or not this complies with the bylaws would be an opinion I guess you would offer as a peer review expert because you've studied bylaws and looked at these notices over the years.
A (Witness nods head up and down.)
Q Can you give an expert opinion as to whether or not facts are accurately portrayed in the notice, that they match up with the evidence that was adduced at trial? Is that an expert peer review opinion?

A I believe so.
Q Okay. Well, what standard --
A I think it's within my capabilities, you know.
Q That's almost like, well, that would be within my capabilities or David's capabilities, would it not?
A Right, right.
Q To review a notice and say, okay, well, in my opinion the notice doesn't properly encapsulate or represent the facts of what occurred as represented by this transcript, any person could make that opinion, could they not?
A If they could read, yeah.
Q If they could read, okay.
A And understand the material.
Q Okay. But not everybody -- well, forget it.
A Yeah.
Q Okay, I understand.
A We got each other's point.
Q Good. Anything else we need to discuss about this notice? I asked you if it complied with the bylaws, and we went through that. You told me that you've got an issue with the description and whether or not that accurately reflects what was found at the

hearing.
A Uh-huh. Or actually that was known prior to the hearing.
Q Okay. How do you know what they knew prior to the hearing?
A Because before they issued this letter, Dr. Minto and Dr. Besson had reviewed the charts, I believe.
Q Have you reviewed the charts?
A To the extent that they're in here, yes. And by "in here," I mean the hearing notebook.
Q And I don't remember. Are they in there?
A Excerpts of them are, the fetal strip and nurse's notes, progress notes.
Q And you reviewed that medical record?
A I did.
Q All right.
A That's in this notebook, just to be clear.
Q That's in that notebook, right. And the primary factual flaws that you found were what with the description that is in both of those letters?
A The fact that there was a two-hour delay.
Q Okay.
A That she failed to recognize -- and let me get the verbiage exactly -- to recognize an emergent

situation.
Q So those are the two factual errors?
A The two-hour one is the one that anybody on the street, I think, reading the documentation would know that that's flawed. And they harped on that throughout the entire hearing even after testimony after testimony showed that that wasn't factually correct.
Q What is factually correct with respect to the delay? What did the record show? How long was the delay? Or was there a delay?
A Well, there wasn't a delay, one.
Q No delay?
A No delay.
Q And that comes from your review of the medical record?
A Right. And, well --
Q And the failure to recognize an emergent situation?
A Can I go back to the first one, just to be factually correct, because I think I know where you're going.
Q Sure.
A To the extent that Dr. Muniz was involved, from the time that she heard about the patient to

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calling the C-section was less than two hours. To the extent she had anything to do with this patient was less than two hours. So it's factually incorrect by a completely objective standard that there was a two-hour delay. You can't delay on something that you're not involved with. Plus, there is medical evidence on the whole delay issue that's, you know, for the experts more to handle.

Q Sure. And you're not offering any medical opinions, are you?

A No. I don't think my medical technology degree would --

Q Excellent, because that would keep us here longer.

A I was accredited by the American Society of Clinical Pathologists, but I don't think that will do it.

Q What portion of the medical record, if any, convinces you there was no delay?

A The timing of when the results of the ultrasound were found and the C-section was called.

Q So there's a report in there you reviewed that shows the time at which the ultrasound report came back?

A Uh-huh.

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Q And there's --

A Documentation. I mean, there's the progress notes, there's a list, you know, the computerized list of notes, and the nurse's notes that have specific times listed.

Q And then what reflects the time she began the C-section, her notes? Some progress notes? What?

A There's several. I don't know if the op report is in there, but there's notes regarding that. And the testimony in the hearing.

Q Well, we're talking about beforehand.

A Prior to that, right. I'm not sure what this page is called, but it's Bates stamped No. 00384, it talks about when the baby was delivered.

Q Uh-huh.

A And there's numerous pages that talk about -- let me flip to tem. I don't have them all tagged. Mostly what I did was match the page cited from the chart to the testimony of whoever was testifying about it. And they looked at progress notes.

Q So you went through the fair hearing transcript and matched up the notes, progress notes, with the testimony?

A Not on every single one, but yes, on the -- on mostly when it cited to the chart, I wanted to see

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how it was reflected.

Q And we got to this a little bit when you were discussing the facts, and I think you said something along the lines of, well, you know, we don't -- the people that are putting together these notices don't know all the facts that are ultimately going to be elicited at the hearing. Isn't that true?

A That's true.

Q And I imagine you have had many occasions in peer review hearings where there are portions of a description that turn out later to be different when you have a full hearing about it; right?

A Yes. But the topic is noticed. If you have a fault with this case, you tell them you have a fault with this case or how you handled this particular aspect of the case.

Q And that's what they did; right?

A That's what they said in this notice. But if the physicians who -- and wasn't it Dr. Minto who wrote the -- I'm not sure who wrote the precautionary suspension letter.

Q Dr. Minto signed the precautionary suspension letter.

A She was one of the chart reviewers. She, of all people, should have known there wasn't a two-hour

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delay. You know, a lot of times there's a medical staff or, you know, a group body that does it. She was the actual reviewer. She reviewed the chart and put in facts that are patently false. And that's just -- I don't know if it was just sloppy or, you know, she didn't look at it or she didn't care, but it was factually incorrect. And I think that's inappropriate.

Q All right.

A Because she had the ability to -- and I understand your point about not all the facts are known at this early stage of the process. But those facts were known to the author of the letter.

Q All right. Let me go back to my notice section. Anything else about the notice we need to talk about or the notices we need to talk about?

A Yeah. I mean, we didn't get to the one where it's flawed.

Q Then let's get to the one where it's flawed. Is that the next one?

A Yeah, the notice of the right to a hearing.

Q And I've got that here.

A Now, this is Notice of Adverse Recommendation, and then there should be one subsequent to this that is the notice of the hearing.

Q All right. Is that the one that has a

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received stamp on it of May 4th, 2010?
A Probably should be.
Q And I'll show it to you (indicating). Is that the one?
A Yeah. But they don't date it, no. Is this it?
Q Presumably it would be in your book and you could match it up.
A Right. I just want to make sure. There's a lot of documents similar. Yeah, this is it.
Q So let's mark that, and I will give it back to you.
A Okay.
MR. DAYHUFF: And would you mark that as our next exhibit, please.
(Whereupon, Defendant's Exhibit No. 6 was marked for identification.)
Q (By Mr. Dayhuff) And let's start with the same question I asked about the others. Is there anything technically wrong with the notice, the undated notice, but which has a received stamp of May 4th, 2010, from the McNair Law Firm? It is Re'd Notice of Hearing. Is there anything technically wrong with that notice in your opinion?
A Yes.

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Q Tell me what's wrong.
A In the second paragraph and the indented paragraph following that.
Q All right.
A They claim that the MEC decision or recommendation was based on the following. And they used the same information, the case that brought this up. And we won't go into the factual issues regarding that.
Q We talked about that, okay.
A Where is it? I'm sorry. Oh, here it is. And then the next paragraph, the Medical Staff Executive Committee, the recommendation is further based upon your history, including the prior peer review proceeding in which the Board of Governors required that you submit to an evaluation, and treatment if needed.
Q Okay.
A Okay. And --
Q I see those two paragraphs.
A And then the rest of that. That paragraph, that adding on had nothing to do with -- well, two things I have. I think they were adding on, well, let's get in everything, things that do not pertain to this particular matter. It's clear, and even

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Dr. DiBona's opening statement in the hearing says that the case that brought us here is the 227589 case, you know, that case. He doesn't go into any of these additional issues that are now added on here.
More importantly is to base a recommendation to terminate a physician's privileges on the fact that she got a favorable psych evaluation goes against everything that HCQIA stands for, fairness and fair play. It's nonsensical.
Q Okay. What does -- and I'm trying to understand. And I understand your position, I guess, that on the facts you don't think it's appropriate to -- well, strike that and let me ask you this.
A Yeah.
Q It would seem to me not to be a problem when you have a peer review action to -- it's not done in a vacuum and that the physician's prior history of peer review scrapes, problems, is able to be considered if it's noticed in the next action. Is that not your opinion?
A The fact that there was one, and the fact that she was on hundred-percent monitoring, I don't have any problem with that. But to bring up that she was required to get a psych evaluation, to list that as grounds when the fact was she had a psych evaluation

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and it came back perfectly clear, that to me stinks.
Q Okay.
A Okay.
Q So it's a little more limited than what I first understood.
A Well, can I add on something too?
Q Sure.
A Because I know if you just look at -- and your word "vacuum" was helpful -- at this notice completely by itself, there's no big glaring issues that I see. You know, it lists all the witnesses and the panel members and all of that stuff it's supposed to.
Q In fact, it complies with what HCQIA would expect for notice?
A However --
Q Is that a yes?
A I believe it does, yes.
Q Go ahead. However?
A To the extent it has those pieces. However, you have to look at where we are now is we're in court and it's after the hearing, okay.
Q Uh-huh.
A And you have to look at this document and then what happened at the hearing. And they don't

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comport, okay. They don't go together.
Q Okay.
A When you look at the decision in this case, I think they gave like nine reasons of what their concerns were. At least seven of them were never noticed. They were issues completely different than what was in her notice. In any of the prior three notices, none of them listed things about -- and I don't have it in front of me right now -- but her behavior, her credibility, things completely outside of -- her documentation. Well, you know, documentation is one of those throw-ins that they will always put in. Any physician that you know can have a problem with documentation, I mean, any physician. And they usually throw that in if there's anything wrong. And they did not put that in this notice, but then they found it as a ground for their recommendation. And that, I think, is a fatal flaw. You noticed her on A, B, C, and you convicted her and ruined her practice on X, Y, Z. Apples and oranges.
Q Let me step back to the opinion about the use of prior peer review or the consideration of prior peer review action in a subsequent peer review action. If I understood your opinion, that is not in and of itself a problem looking at this in the abstract, I

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guess, that it's not uncommon and it's not a problem for a medical staff or a hearing panel to not only consider new cases where there has been a problem but to consider a prior peer review action and the result of that as part of the facts and circumstances that they're analyzing to decide what the appropriate sanction or remedy should be.
And the way you said that, and I'm not sure whether you intended it to, but if you're going -- you have to look at the result of the prior adjudication, okay. In this case it was found that there was no credible evidence.
Q And I don't want to talk about the particular one right now. But just as a matter of principle, the --
A No, the prior one in this case.
Q Right, right.
A And I understand you have to look at that. If in the prior one there was found in anybody's case that there were no problems found or, you know, the reason for the recommendation wasn't supported by the evidence.
Q Uh-huh.
A To me it's patently unfair to say that we're still going to use it against you. We gave you a fair

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hearing and they determined that you were fine, the cases shouldn't be held against you, but we're going to hold them against you anyway. I have a problem with that.
Q Okay. So if I understand you, it is not inappropriate to consider the results of a prior peer review in a subsequent peer review as a matter of principle; right? It's just that you can't mischaracterize the results of a prior peer review and use that in a subsequent peer review; is that a fair incapsulation of your opinion?
A It's closer. But I think really, just as a practical matter -- and, I'm sorry, when I hear it back, I'm like, well, no, not exactly.
Q Well, let's try again just so I make sure I understand.
A Yeah. The fact that she was on -- there was something left hanging from the last review, and it was ongoing, and that's kind of part of the reason that they reviewed this case. And I know there were others. I think that's a fact and everybody should hear that and that's reasonable. But the five cases that were discussed, they were adjudicated. You know, a decision was made on those. And no adverse action was taken against her. They took it on a completely -- on her

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personality and nothing to do with her clinical care. And I know you can't get my arms moving in here. But I think it would be inappropriate to say we're going to use that as a ground to terminate your privileges now. It's like you were found innocent, but we're going to use it to convict you now.
Q Have you ever in your hospital practice assisted with a notice or assisted with a hearing where you provided in the notice that this is about these cases primarily and, by the way, we may also discuss your peer review history as part of this hearing? Or, you know, words to that effect.
A I'm trying to think. I've done a lot of notices.
Q You have. 35 or so. Have you ever sent out a notice that says --
A I'm thinking.
Q -- we're going to consider as part of this the result of what happened last time or your peer review history?
A I can only think of one case where it might have, and I don't have it in front of me. And the only reason I say it might have is because it was more than one hearing on this same physician. And I'm thinking of the ones I've written and also received on behalf of

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physicians. They're usually noticed on what they found issues in, the current issues. So I can't think of any where I did that.

Q Well, peer review is not like a criminal matter where if I'm tried and convicted of assault, assaulting David, okay, and then I serve my time and it's over, and then I assault or I do something else, like I steal a car, they're not going to consider that assault, they're not going to try me for that or even bring up the assault in the criminal trial for me stealing the car. You're not suggesting, are you, that there's that kind of in-a-vacuum situation when it comes to peer review, are you? You're always going to have the history of peer review being part of the milieu that is considered, are you not?

A Well, when it goes all the way through the hearing and the bylaws specifically provide a physician will only have, is only entitled to one hearing on one matter, to me it's inappropriate to say, well, all right, we went through these five cases and there was no problem, you had a hearing on that, and to try and have to defend on those cases again I think conflicts with the bylaws.

Q Did she have to defend on those cases again in 2010?

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A It was noticed.

Q It was noticed.

A Right.

Q But isn't there a difference between having to retry all those cases again, if they were to list all those cases again and say we're going to go back into the facts of all of those, isn't that different than saying, look, we've got to consider you in light of the history that has gone on before? Isn't that fair?

A That's not what it says, though. It doesn't say we're going to consider you based on the history.

Q Further based upon your history, including the prior peer review proceeding in which the Board of Governors required that you submit to an evaluation, and treatment if needed, by a physician with expertise in identifying and treating disruptive physicians and physicians with personality and behavioral disorder and issues, and also required 100-percent monitoring.

A It says the recommendation -- and you have missed the most important part -- is further based upon. And that's the problem. So, yeah, I still have a problem with it. And it sounds like you're saying, well, they told her about it. They didn't -- you know, if she had taken this for valid and prepared on those

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five cases, that took away from her preparation on what was really at issue, the one case. So here, you know, you're making it -- you're clouding all of the issues and making it more difficult for her to prepare for trial.

Q Well, they list later witnesses that would give her some idea of what cases were going to be inquired into; right?

A Yes.

Q Okay. Let me see.

A And they list the five cases. So if, you know, she was noticed that we're going to talk about these five cases, and then you're saying they didn't, you know, so they had her go and prepare for a hearing to save her livelihood on those cases.

Q Do you know whether she expended any significant effort preparing to retry the five cases?

A I do not know that. But I think that doing that to a physician is inappropriate. Here, we're going to try you on these grounds, and then try them on something completely -- well, here is what happened. We are going to try you on A, B, and C. The hearing was on a little bit of C, and then that didn't work, so they added in a couple of other issues. And then the decision was on X, Y, and Z.

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Q Can you recall ever submitting a little part of your presentation on behalf of a hospital, on behalf of an MEC, about a physician's prior peer review history as part of a peer review action?

A I'm sorry, ask your question again.

Q When you represented the MEC in all of your hospital work, can you recall a time when you presented or had presented by a witness the prior peer review history of a physician under review, prior peer review history that predated the specific cases about which the hearing was focused upon?

A Yes. And it was limited to -- well, to take it in this case, it would have said there was a prior peer review hearing and that she was under 100-percent review. That was the extent of it.

Q Because that was the decision of the Board of Governors; right?

A Right.

Q Okay. You didn't retry the prior cases?

A That's right.

Q But you did provide the information about the ultimate decision in the prior peer review action in the subsequent one?

A Right.

Q And that's appropriate? You wouldn't have

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done it if it was inappropriate.
A Well, I'm trying to see how -- ask your question again. I'm sorry.
Q That was appropriate, what you did?
A No, the one before.
Q I don't remember that question.
A Okay.
Q When you did what you did, that you just described, that was appropriate and there was nothing wrong with that?
A What I did was appropriate, yes.
Q Excellent. All right.
A I believe, based on my recollection.
Q Based on your understanding of peer review concepts and principles?
A That's correct.
Q Okay. Having somebody retry each individual case on the merits of each individual case would not have been appropriate in your opinion; right?
A I believe that's correct.
Q Because it's already been done?
A It's already been done and they're not entitled to another hearing on that matter. And she wasn't being tried on the hundred percent -- you know, I think she was noticed on that, but the way they talk

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about this is that that was based -- that was the basis of their decision. And that's what bothers me.
Q Is it a fair characterization -- well, it's not a fair characterization, is it, to say she was retried on the individual five cases after reviewing that hearing transcript?
A There was some testimony in there, but it was very limited.
Q So it wasn't a retrial of the five cases, was it?
A No, not a full. But they did bring up information and didn't counter it with the positive information, so that was troublesome.
Q All right.
A And like -- well, I'll stop there.
Q What's your understanding of what the hearing panel found in 2009?
A That there was not credible evidence to support a decision for terminating her privileges, was the main thing.
Q Did they make any negative findings?
A I think there were some additional, there were some concerns, but not to warrant termination of her privileges. And I don't believe, but I'm not sure, but I don't believe they recommended any reportable

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adverse action. But I'm not positive on that. I would have to see the document to refresh my recollection.
Q All right.
A I think it was the Board that changed things.
Q And it's the Board's prerogative to change things; right?
A That's correct.
Q And there's nothing wrong with that?
A It has to be -- it should be based on fact and sound peer review principles.
Q Okay.
A Not because the physician applied for privileges at a competing hospital.
Q Do you believe that's what happened?
A I think that's a fact that should be considered. You have a physician that's on staff, you know, never had a peer review hearing before for, what, seven or eight years. She applies for privileges at another hospital, credentialing inquiries are made, and shortly thereafter she's -- you know, a recommendation to kick her off staff. I think that's something that needs to be factored in.
Q Just so I'm clear, though, you're not offering an expert opinion that there's a causal

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connection between her application at another hospital and the result of the 2010 peer review, are you?
A I don't know that I'm -- that anybody can give an expert opinion on that.
Q I would agree. So you're not?
A No. I'm just saying it's a factor when you look at the fairness of this whole process.
Q Understood. Sounds like part of your issue with the notice was the notice as compared to what the ultimate findings were? Is that fair?
A And the fact that they added on things that were not appropriate.
Q And I think we have talked about the added on.
A Yes.
Q Is there anything else I need to hear, any other part of that opinion that I haven't heard yet?
A I don't think so. I think we have the gist of it.
Q And I don't think we talked in very much detail about what appears in the notice versus what ultimately was the finding.
A That's right.
Q Maybe we should talk about that so I understand that. Do you have the hearing panel report?

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A I do, the corrected version.
Q Is that the one?
A The October 12th, I think that's the ultimate one.
Q All right.
A Aren't they mostly similar except for an added paragraph 9?
MR. DAYHUFF: Let's mark this next, please.
(Whereupon, Defendant's Exhibit No. 7 was marked for identification.)
Q (By Mr. Dayhuff) We have had something marked as Exhibit 7. Can you let us know what -- can you identify that for the record.
A Exhibit 7 is the Aiken Regional Medical Centers Corrected Report of the Hearing Panel, dated October 12, 2010, signed by Dr. Searles, S-e-a-r-l-e-s.
Q And that is the hearing report I think you mentioned as we were discussing your opinions regarding the deficiency of the notice; is that right?
A That's correct.
Q Now, tell me again why that notice -- and I gathered it wasn't specific enough, was the gist of your opinion, but you tell me.
A It was apples and oranges.
Q Apples and oranges, okay. How so?

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A Well, they say that the reason -- and I'm saying "they," the notice of hearing for the reasons set forth for the recommendation was the case of 227589.
Q Okay.
A Okay. Then they say it was also based on your prior history.
Q Uh-huh.
A The fact that you had a psych evaluation. They don't mention that the psych evaluation came back clean. And that she was on 100-percent monitoring.
Q Did you review the psych evaluation, by the way?
A I read it, yeah.
Q Okay.
A The first finding doesn't talk about anything that's -- you know, you can't tie that to the verbiage. They say that the recommendation is not arbitrary and capricious, but they didn't give any specifics. So let's move on to 2.
Q Okay.
A It says that during the course of the proceedings practitioner lacked candor in dealing with her peers. And, obviously, there's a timing issue there, but candor wasn't ever listed as a concern for

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her.
Q Where do you think that finding that she lacked candor came from?
A From the hearing testimony, is what my understanding is of what that reads. And I understand the timing of that.
Q So the hearing panel observed the testimony of all the witnesses at this hearing and decided, a panel of her peers, that she lacked candor. Is that your understanding of that finding?
A That's what it says.
Q Do you dispute that finding?
A I don't dispute that that's what the finding says. I mean, I can read.
Q All right.
A Okay. So I'll give you that that doesn't --
Q Do you have an opinion that flows from that finding or a peer review opinion that flows from that finding or that addresses that finding?
A I don't think she lacked candor. I think she testified to what she knew. But I don't know her, and that's just reading the documentation.
Q So if you were sitting on the hearing panel, you would not have found she lacked candor?
A I can't say that because so much of that is

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based on observing people. I've just read the record. I really don't have an opinion on that, okay, so how about that.
Q Fair enough. What's the next one? It's very similar to No. 2, isn't it?
A Right.
Q This idea that they question her credibility because of what she asserted about patient No. 6 refusing a C-section that she later recanted. They observed the testimony of all the witnesses and her to have -- that they raised serious questions about her credibility and she recanted her testimony.
A And that's something that occurred in the hearing.
Q Very similar to No. 2?
A Yeah.
Q So you don't really have any opinions about that and that's the factual finding made by people observing witnesses; right?
A I agree with you on that. No. 4, credibility is further demonstrated by post-incident entries which are inconsistent with other credible evidence. You know, they had those entries in the chart. That wasn't an issue. To the extent there were inconsistencies in the record, they could have noticed

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her on that.
Q Now, that sounds like an opinion you're offering.
A That's an opinion I'm offering.
Q That No. 4 needed to be listed in the notice; is that your opinion?
A I agree, yes. To the extent the issue of her credibility based on documentation in the record, if they're going to -- I think that should have been listed.
Q All right. Now, they did list the case from which this finding arose, right, in the notice?
A Yeah. But they also said specifically what they found wrong with that case. They said inappropriate medication, delayed two hours, and failure to recognize an emergent situation. Nowhere was there any mention of inconsistent record entries, documentation to give them a broader term, any other concerns with the record. They said this is what we found wrong. What's interesting is they gave up completely on the medication issue. Their own expert said no, giving Brethine or terbutaline was perfectly fine. And then on the delay of two hours, they said, well, it could go either way. I mean, they completely abandoned what they noticed the hearing on and found,

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you know, we don't like her. We still don't like her. We didn't like her when we sent her for a psych evaluation, and we don't like her even more now, apparently.
Q So what should that notice, if you were writing the notice as the hospital medical staff attorney or the medical staff credentialing person, you would have written what to make that notice appropriate?
A Issues regarding credibility and candor, if it fits in here, or inappropriate documentation regarding post-incident entries.
Q Okay. Now, isn't it very possible that candor issue didn't come out until witnesses were called?
A And I think that's what we already -- I gave you that point in 2.
Q We hit that, okay.
A Yes.
Q Okay. But your point on No. 4 is that the entries would have existed beforehand, right, before the trial?
A Well, that's what it says, inconsistent post-incident entries.
Q Which are inconsistent with other credible

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evidence. Where do you think the other credible evidence came from?
A From the entire record. I mean, they could have added onto it in here, but they certainly -- I didn't --
Q It could have also come from witnesses' testimony, couldn't it?
A It could have.
Q Okay. So it's very possible they didn't know until after witnesses testified that post-incident entries were inconsistent with credible evidence; isn't that true?
A I mean, anything is possible. But if they had concern about her post-incident entries, I think they should have noticed her on it.
Q But it's possible they didn't have those concerns until they heard the evidence at trial?
A It's possible.
Q And if that's the case, it wouldn't be inappropriate to list that as a finding after you hear the evidence when it didn't specifically appear in the notice?
A Possibly as a finding, not as a ground to terminate somebody's privileges. The ground of -- you've got to remember --

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Q I don't understand.
A Well, the recommendation to terminate her privileges was based on, you know, medical care for this particular patient.
Q Uh-huh.
A Okay. And now they're saying, well, we didn't like your credibility and your documentation, you know. We found your medical care was okay, but we're going to use that to terminate your privileges, the harshest possible remedy that they could issue.
Q And that's kind of a separate issue, isn't it?
A That is. But I think it's worth noting.
Q And we'll get to that. And that certainly can be an opinion that this is too harsh of a sanction. And it is your opinion, you have told me. But the more specific question that I asked was that if they didn't discover the inconsistencies in the post-incident entries until after they took testimony of witnesses, then it would be appropriate to note that as a finding, if they so found, and it is not a problem that it didn't specifically appear in the notice that was sent to her before, if my supposition is true?
A Well --
Q Do you agree with that?

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A Yes, if it was only based on information that came out afterwards, if they're not talking about inconsistencies in the record.
Q Okay.
A Okay.
Q All right.
A I think that's fair.
Q Let's go on. I'm on to No. 5. This is another that is very similar to 4. And I guess while we're here, you're talking to me about how or what's found here may make the notice problematic. So why don't we keep on that tack and tell me what else here, if anything, may make the notice problematic in your opinion?
A I don't see anything on this one because it seems to be only talking about hearing testimony. But, again, it's completely off point of what they found were grounds for summarily suspending her privileges.
Q And you've got to explain that to me. Do you mean that the sanction was too harsh? Is that like a separate opinion? Because right now we're talking about what here would make the notice inappropriate; right?
A Right. And for that point, I don't think this -- just to take it as a whole, let me just say --

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and we can go through each one again. But if you look at what was noticed and what was found, the concerns listed in the notice -- and I don't want to overstate this. But, you know, they didn't talk about the medication, whether it was right or wrong, and they didn't talk about failure to respond to an emergent situation, and they didn't talk about the delay. Well, they did mention the delay, but they said it could go either way. So --
Q And I see -- well, I'm interrupting. Go ahead.
A So that's what my concern is, is that they basically noticed her on one thing, tried her on one thing, and then found findings on something completely unrelated to what the initial notice was.
Q Okay.
A But I understand your point. They're allowed to find on something that came out during the hearing, so I'm not saying that's wrong.
Q Got you. So you're not going back on that?
A I'm not going back on that. But I think you need to look at, in fairness, what she was -- they said we're going to terminate your privileges because of the way you acted on this case in this care, and then they said, well, we don't like your credibility and your

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candor and there's some inconsistency, so we're going to kick you off staff. And I don't think it is fair and I don't think it's appropriate.
But as up to No. 5, I think you're right that the notice issue is not a problem, okay. How about that?
Q Fair. How about 6 through 9, is there anything in 6 through 9 -- and take a minute to look at it -- that should have appeared in the notice?
A Yeah, No. 6, completely. Practitioner exercised poor judgment in both contemporaneous medical record entries and especially in the statement she submitted to the MEC. Furthermore, several inconsistencies in this statement were noted. But for the last sentence, you can't tell whether they were talking about hearing testimony.
Q So if the inconsistencies were discovered through opposing hearing testimony, that's fine. If it was not, you would prefer to see that poor judgment, or something along those lines, in the notice?
A Well, it says in both contemporaneous and records entries, so they were talking about her judgment and what she wrote in the chart was inappropriate, her documentation was inappropriate, her judgment was inappropriate. You can't find that in

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this notice, okay.
Q All right.
A And then 7?
Q Yes, continue. Go ahead.
A All right. This is where they start waffling. First we had a problem with I guess they're saying -- well, I'm not going to guess. But they say if that -- if they're saying that her decision to leave the hospital demonstrates poor clinical judgment, they could have specifically listed that. And they did not. I mean, that's something they argued and they didn't notice her on that.
Q Okay.
A Let me see. What else? Then what's more important to read in this, just in the total package, is that they backed off to the extent that was an issue. They don't think it really had any effect on the ultimate outcome, but we don't like it.
And let me read 8. Here we go. Here they backed off of their delay issue. And I'll give you that they did talk about delay in the notice.
Q So that's not an issue in the notice?
A That's not an issue in the notice. It has other problems.
Q And we're going to hit other problems with

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this after the notice issue.
A Okay. Then in No. 9 raises concerns about her ability to work with other members. If that became an issue -- well, all of these, actually, her lack of candor and inconsistent entries, if that became an issue, they could have -- that the MEC wanted to base its recommendation on, they could have amended their notice, okay. If they're going to put on testimony and claim that she doesn't have an ability to work with others, she should have been noticed and given the opportunity to call in her own list of witnesses and other colleagues. And she actually did, and the ones that testified, you know, there weren't questions asked on that specific issue.
Q All these findings in the corrected report of the hearing panel flow from the analysis, the findings -- the analysis of the hearing panel regarding the case that was in the notice; right? They aren't about other cases; right?
A I believe so.
Q Okay. So they're all about the case that was in the notice?
A That's right.
Q The amending of the notice, the hearing notice, do you commonly amend the hearing notices?

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Have you ever amended a hearing notice?
A No. But I don't change tracks in mid field.
Q So you've never had to amend a hearing notice because the hearing has raised a finding or an issue that you didn't feel was appropriately noticed in the notice you sent previously?
A I don't believe so. Or the issue wasn't --
Q But in this case you would have sent out an amended notice to her, and you would have said in addition to what's there what?
A If they're going to try her on her ability to work with others, which it seems like they did, and her candor, as that became an issue -- because they said many -- well, I can't cite that right now. Let me see. I can't find it. I thought I had it tabbed.
Q Sounds like you would want mention of her candor issues and inability to work with others in an amended notice?
A Yes.
Q All right.
A If they're going to -- well, yes. I will just leave it a yes.
Q Now, wouldn't my friend David and his co-counsel, Biff Sowell, who were sitting there in the hearing, wouldn't they have notice of these issues as

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they came up just by virtue of listening to the testimony and hearing the arguments about those issues?
A (No response)
Q There was obviously a dispute about who was telling the truth regarding certain elements of this case; right? There were a lot of nurses who testified and Dr. Muniz testified and the pathologist testified about what she said. A lot of he said/she said; right?
A But there was no allegation that Dr. Muniz was -- you know, that her credibility or her candor was an issue at all. You know, some people said the time was this, or whatever, you know, and there was conflicting evidence, but that's different.
If I testified the sky is brown and you testified the sky is red, that doesn't tell me that we're going to make an issue of the fact that there was conflicting testimony.
Q You certainly --
A Well, let me restate that. That that's going to be used solely against me. They could have said, well, the nurse is lying. You know, the nurse, she doesn't get along with that nurse or that nurse doesn't get along with her. That was never brought up as an issue. There was just a -- there was three nights of hearing. To say, oh, you should have known

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that, you know, in the heat of battle I don't think is completely fair.
Q So you wouldn't say that they were provided notice, Dr. Muniz was provided notice by virtue that testimony regarding the inconsistencies was obviously taken at the hearing? That wouldn't be notice?
A Say that again. Say that again, I'm sorry.
Q You wouldn't be comfortable that Dr. Muniz had notice of the candor and credibility issues by virtue of her and her counsel participating in the hearing at which conflicting testimony was elicited?
A I think that counsel for both sides could have acknowledged, you know, could have seen that there was conflicting testimony. You know, that's obvious. Hopefully, everybody did. But to use it as grounds for a completely separate ground to terminate her privileges when it wasn't noticed, I think that's where the fault is.
Q Okay. And, as we discussed, it's very possible that the hearing panel didn't come to a finding and no one could have come to a finding about the lack of candor until after the evidence was in; right? You wouldn't have had the witnesses testify yet, and we talked about that earlier.
A On the things where -- well, let's see. Any

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inconsistency that -- like look at No. 9. And this was added on after the fact. This is after the corrected version came out, which is interesting and a whole 'nother issue we need to talk about.

Q And we'll get to that, I'm sure. No. 9 is talking about her testimony in contrast with the pathologist's testimony; right?

A Right.

Q And the hearing panel obviously listened to that and decided that they believed the pathologist and not Dr. Muniz; right? And whether that's right or wrong, they looked at the evidence, observed the witnesses, and made that call. And my question, I guess, is that they can't make that call to put it on a notice until they see those witnesses; right?

A Well, the part on the dispute with the pathologist is only, you know, one instance.

Q Okay, you agree with me with respect to that instance?

A Right.

Q Okay. Go ahead.

A Unless I -- I haven't looked at if there's something on the pathologist's report. I don't know that yet. Or if it's even in there, you know, documentation that they had beforehand. But on this

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last sentence if they're only talking about testimony at the hearing, I understand your point about the notice.

Q Okay. Did you have anything else on 9?

A Same issues.

Q All right.

A Well, also do you see any findings on, other than 8 -- well, let's see. Is it 8 where it talks about -- only No. 8 really talks about the delay issue, and it doesn't go into the two-hour issue. They just generically say, well, there may have been a delay and we don't know if it had any effect. They don't make a finding on what they noticed her on. They said you gave inappropriate medication, and they made no finding on that. Well, we're going to forget about that one.

Q And let me ask you what's wrong with that?

A They noticed her and said you did this wrong, and then they apparently found she didn't do anything wrong or not enough to even put it in her decision. And that was one of the grounds for termination.

Q Got you. Doesn't that happen all the time? You have a list of things someone has done wrong, and sometimes the hearing only finds you've done two of those three. And there's nothing wrong with that, is

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there, from a peer review perspective?

A No. But if you look at the -- you take that, and I guess that's where I'm --

Q Seguing into it?

A Yes, seguing into it. And I can't help it, because I don't want it to sound like, oh, they did nothing wrong, because I don't think that's -- that's -- if you look at this notice and you look at this decision, you wouldn't think that it was the same case, pretty much, other than the use of the word "delay" once.

Q Well, there's delay in No. 7 too; right? Not the word "delay," but the issue of delay appears there, right, the decision to leave the hospital?

A And, see, that's something they could have specifically said, you have to be on campus during cases. And she was on campus, but she was just in a different building.

Q And, of course, we don't know if they -- we don't know that anyone knew she left until this hearing, do we? I mean, was that in the medical record, "I left"? I don't remember reading that. Do you?

A No, I don't.

Q So that may have been discovered in the

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hearing?

A Yes.

Q All right.

A But they don't say that there was a delay.

Q Well, I guess I'm inferring that in 7. You don't infer that in 7? And it's fine if you don't.

A No, I don't think that. I think that's a different issue.

Q It's just a matter of her not being there?

A Yeah. They don't say -- yeah, I think your inference is --

Q Well, I guess I assume that by not being there, that would delay treatment.

A Well, she wasn't there because they were doing -- waiting on her doing the ultrasound.

Q Okay. So delay only appears once?

A Right.

Q All right.

A Out of nine items and no mention of --

Q Got you, got you, all right. And one more question on this. We talked about the issue being -- you know, this issue about credibility and whether you would have notice of the credibility issue or not by sitting there and listening to it. And I think you said, well, yeah, you would hope the attorneys would

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know that. I mean, credibility in that case, it wasn't just I said the light was red and you said it was yellow. Wasn't there some pretty heated exchanges in testimony on the credibility issue? And I'm thinking of Mom is called. I mean, wasn't that a big issue in this hearing from your review of the transcript?

A I think they made an issue of it. But if you look at whether it had any decision on when she called the C-section, on the facts, the actual medical care, it had nothing to do with it.

Q Okay. And the only issue I'm trying to get at, it wasn't a surprise, credibility being an issue wasn't a surprise to anybody when you reviewed that transcript. I mean, it's very clear it was a big issue in that fair hearing. Agreed?

A I think that, yeah, there were not -- Dr. Muniz -- well, the mom's testimony, you could tell she -- I read it as she didn't say a truthful thing.

Q Okay.

A Until she was being crossed, and then she was like, oh, yeah, she was upset, you know.

Q My question is, I mean, the reason Mom was called was strictly on the credibility issue, wasn't it? She was called to dispute a position Dr. Muniz had taken; right? She wasn't called on a medical issue.

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A Right.

Q The pathologist was called on a credibility issue to dispute what Dr. Muniz had said about what he said; right?

MR. DICK: Object to form.

A Yeah, I don't know about that. Sorry.

Q (By Mr. Dayhuff) You don't recall?

A Yeah. I don't know the pathologist's testimony well enough.

Q And the reason I ask that is credibility, you would agree with me, credibility, Muniz's and the other people, was a big issue in that fair hearing?

A I think credibility of the witness is always an issue in a hearing.

Q It is. And in this one, in particular, it was a big issue?

A But --

Q Would you agree?

MR. DICK: Object to form.

A No.

Q (By Mr. Dayhuff) You wouldn't agree credibility was a big issue in this fair hearing?

A Not more than a lot of hearings.

Q Really?

A I mean, you had witnesses coming in saying

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completely opposite things. I think that happens more times than we would like.

Q Really? Okay.

A Especially you can tell with some of the nurses, I mean.

Q So it was an issue, but not a bigger issue than the norm for you, credibility in that fair hearing; is that fair?

A Here's where I think we're differing in my mind. That credibility is always -- you know, any good lawyer or judge is going to look at the credibility of the witnesses, I think. You know that's a factor that you do. Okay. Whether it's something you're going to be -- well, did those issues where there was a credibility issue, did it affect the reasons, you know, the clinical reasons that were found at fault for Dr. Muniz? No. And they didn't find that they did. They just said we don't think you're trustworthy. Didn't have any effect on how you treated this patient or any effect on the ultimate outcome, but we don't like it. And that's what the concern is, that they found different issues that did not relate to her medical care to kick her off staff.

Q Which is different than a notice issue. I think it's a fundamental issue you have with the

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report.

A But you need to look at them together, so yes.

Q All right. Anything else before we leave the report? And I want to move to the hearing officer overstepped his bounds, but while we're on the report, we talked about the notice issue vis-a-vis the report. Is there anything else, anything you're going to offer about the report itself, the findings of the report?

A Well, yeah, the whole process of it being corrected and the standard of -- I mean the burden of proof.

Q Well, let's talk about that.

A Do you want to talk about that?

Q Sure, let's hit that. What happened that was a problem? And before I go there, I'm sorry, I think you have opined an amended notice should have been issued on candor and judgment. Was that it or was it just candor and credibility? I think it was candor and credibility.

A Yeah, I think those were the two.

Q If they were to issue that notice, the amended notice, during the hearing process, does that violate the Health Care Quality Improvement Act or does that result in a process that wouldn't qualify for

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immunity under the Health Care Quality Improvement Act?
A To the extent she didn't have adequate notice to defend on those, on those issues.
Q Well, I guess that's the ultimate question.
A Right.
Q Do you believe that the lack of an amended notice resulted in such a lack of notice that that failing results in this peer review action was not comporting with the Health Care Quality Improvement Act standards?
A I believe so, yes.
Q Okay. That alone?
A Well, I think having inadequate notice is grounds.
Q I agree notice is one of the things you look at.
A That's right.
Q My question is more specific. The lack of amended notice in this case, does that rise to the level of a lack of notice that would result in the Defendants losing their --
A Immunity?
Q -- immunity under the Health Care Quality Improvement Act?
A It's getting late.

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Q It is.
A I don't think anything is taken in a vacuum. I think that one factor in this is something that, yes, I think it supports it.
Q Supports it, but not alone? You're going to put that together with other things that you're going to tell me about and that may or may not?
A That's correct.
Q All right, fair enough. And I interrupted you on the notice again, for some reason. Why don't you go ahead and tell me about --
A The process of --
Q -- the process of the corrected report, why is that a problem?
A Yeah. And this goes under the --
Q Hearing officer overstepped bounds?
A Yes.
Q Okay, good.
A And just incorrect. As I understand it from reading the record, the parties had stipulated to changing the -- to using a different burden of proof than what's in the Medical Staff Bylaws. They both did that. And the hearing officer was there and accepted that stipulation and put it on the record.
Q Okay.

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A Okay. When the decision came out, they used the burden of proof that was in the bylaws.
Q Okay.
A Which if no stipulation had been made, that wouldn't have been a problem. But there had been a stipulation, so it was the wrong burden of proof.
Q Okay.
A Okay. And the way the burden of proof is in the bylaws is it almost has to be a miracle for the physician to prevail, okay. I mean, it's a really difficult burden. Clear and convincing evidence that, you know, what they did was arbitrary and capricious. It's a pretty hard burden. But the burden shifted to -- and I don't want to read it incorrectly. Is it in here? Where is it?
Well, so the burden was on Dr. Muniz, right, in the Medical Staff Bylaws, and she had to show by clear and convincing. And they shifted that to the Medical Executive Committee by a preponderance of the evidence. And, I mean, I can look it up. But if we're all in agreement that that's what it is, I --
Q And I don't remember the wording, but I remember the burden was in the bylaws on the physician.
A Right.
Q And they shifted the burden to the MEC. I

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don't remember the phraseology of the burden, and I don't know that it matters. If it matters for your opinion, we can go look at it. But if it doesn't, then we --
A Well, let me see. Hearing panel shall recommend -- and this is from the credentialing policy bylaws -- in favor of the MEC unless it finds that the individual who requested the hearing has proved by clear and convincing evidence that the recommendation that prompted the hearing was arbitrary and capricious or not supported by credible evidence.
Q You got that almost right. Perfect. Very good.
A And they shifted that to the Medical Executive Committee. And I can't find it right now. But they may have made it easier for the MEC, but --
Q Does it matter for your opinion what the ultimate burden on the MEC was?
A Not really, because the fact that they shifted it --
Q And I think it was preponderance of the evidence, but I don't remember. But if it doesn't matter for the opinion, then --
A It doesn't that much. But, I mean, if you were going to ask me about it, I wanted to see.

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Q That's okay. So what was wrong with -- and I think you've told me your understanding of the facts.
A Right. And --
Q What's the opinion?
A The opinion is -- well, I think we need to have a little more facts. It's that an erroneous decision came out or, you know, there was a flaw in it, an inappropriate standard that was recognized. And that was raised by Dr. Muniz's counsel. So they sent it back to the MEC -- well, the MEC piped in and said, hey, we understand that's an error, so let's reissue a corrected one. Which there's a little question there, but it's not in the bylaws. And if it had gone up to the Board, it probably would have come back. So I don't have a big problem with them reconsidering it.
Q In fact, do you have any problem with them reconsidering it?
A Only in that I think it's very difficult to get a body to say, you know, the MEC -- the doctor has to prove this really incredibly hard burden, and they deliberate on that and find that -- and it's a very, you know, a very wishy-washy opinion on the actual true facts. But then to get those same people in a room and say, oh, no, now we're going to put the burden on the MEC. And what they should have done is seriously

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reconsider the evidence in light of the burden, okay.
Q All right. But you don't know how seriously or not they considered the evidence, do you?
A Well, let me tell you what my decision is based on, my opinion is based on, is that it appears from the emails and the fact that I know how these hearings work that the matter went, after the MEC issued its letter saying we'll go back, or the panel member, that it went back to Mr. Nauful, okay. And there were email exchanges between Mr. Nauful, the medical staff coordinator, other individuals, I think in-house counsel, but I'm not positive, and Celeste Jones, who I understand represented the MEC. Nowhere was Mr. Dick or Sowell copied on any of those emails.
Q Okay.
A So for the Medical Executive Committee attorney and the hearing officer to be exchanging emails I think is highly inappropriate. So that's one factor. And I think that there's -- and we'll have to look at this later, but --
Q So kind of an opinion about the impropriety of the process through which that amended report was generated, and I understand that.
A Yes.
Q Okay.

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A Exactly, exactly.
Q Anything else?
A And then it looks in the record from the emails and when the document was issued, the corrected document, that the hearing officer, who, according to the bylaws, is not entitled to a vote, rewrote the decision basically by just changing the burden of proof, not changing any of the findings except for to add something else, that last No. 9, which that's a whole different point I think we need to get into. But then circulated amongst the panel, if at all. And it's hard to tell from the record, because there's emails that say, you know, I've changed this, circulating, we need to have a meeting with the hearing panel, and Mr. Nauful, the hearing officer, is already revising the decision. So he circulated a corrected version, it wasn't signed by anyone, for them to look at, we hope. And it's not absolutely clear, other than Dr. Searles signed it. But I think that's highly inappropriate. The hearing officer took on the role of, oh, I will just write the decision and they'll probably follow it.
I think what should have happened as a hearing officer is they should have met again, either by telephone or in person, and talked about the issue of the burden of proof and what effect it has. I think

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the hearing officer can tell them about the burden of proof and how it does, but the hearing panel has to make the decision.
Q All right. Let me see if I can encapsulate this. Reconsidering the original report based on the appropriate standard of proof agreed to by the parties, that in and of itself is not problematic in your opinion?
MR. DICK: Object to form.
A Well, the fact that the hearing officer made the mistake in the first place is an issue. But given that --
Q (By Mr. Dayhuff) It's a mistake, sure.
A It's a mistake.
Q But does it raise -- I mean, what I'm here about is to understand what -- you know, your standards that I understood were does it violate the bylaws, and then we would have a peer review problem, or does it violate the peer review we would expect to see under the Health Care Quality Improvement Act.
A Which includes fairness and notice and proper hearing.
Q Okay. And just the idea of setting the critique of what you think happened in the process aside, there's nothing wrong, per se, with

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reconsidering a hearing report, doing another hearing report, when you've got the wrong burden of proof in there? That alone is not a problem, is it?

A I think technically the decision should have gone to the Board and it should have been the Board's decision to send it back to the MEC. I don't think, technically, that they should have said, oh, we made a mistake and let me change. That could be grounds for kicking it out that it's arbitrary and capricious anyway. As a practical matter, I'll give you it's very possible the Board would say send it back.

Q Okay.

A Okay. And I keep saying the MEC, but it's really the hearing panel.

Q So you don't find fault with the reconsideration, per se, you find fault with the way you believe that reconsideration went down; correct?

A And I'm going to give you the same answer, because I don't think it's absolutely correct to say I don't have any problem with the hearing panel on its own deciding they're going to issue a new decision when there's an error made, because technically once they issue their decision, it's supposed to go to the Board or to the appellate body.

Q Let me rephrase that just slightly then.

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You're not opining that the mere reconsideration by the hearing panel made this unfair?

A No.

Q What you're alleging is that the way this went down made it unfair?

A Exactly. The fact that they did -- well, that's the whole issue, isn't it, is did they really even consider it.

Q Okay.

A Because I believe the evidence shows that -- and I know how these hearings work, is that the hearing officer advised them -- the hearing officer drafted the corrected decision, and that's what the evidence shows in the emails, said that I'll fix it and then we have to have another hearing. And there's no documentation that they had another deliberation. There may have been, I'm not saying that there is or isn't, but the corrected draft precedes that.

Q All right. So that opinion is based upon your understanding of the facts that may or may not be accurate; fair?

A That's what everybody's opinions are based on.

Q Very good. And you don't know whether, you don't know whether the hearing panel got together on

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the phone or in person to discuss this matter at all, do you?

A No. We can only go by what the evidence shows.

Q All right. And you're not expert in analyzing what the evidence shows. I mean, that's something, again, that, you know -- that's a jury matter. That's something anybody can do. You're an expert in peer review; right?

A That's correct.

Q And I understand that. I want to hit the ex parte issue a little bit, because that seems to be a part of this. You said earlier in your deposition, if I'm not mistaken, that contact between the hearing officer and the medical staff coordinator is not a contact that you would view as inappropriate, right, and that happens all the time?

A I know for a fact that happens all the time.

Q And it's just got to; right?

A Because that role -- well, to the extent that role is administrative. Here's the emails for the panel members, get this to them, you know, give them these documents.

Q And it happens all the time, okay. What you're concerned about is the contact between Celeste

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Jones and the hearing officer; is that correct?

A That's correct.

Q And what about that contact concerns you?

A Is that --

Q Just that it happened?

A Well, that, and that Dr. Muniz's counsel was not copied. If you're going to talk to one side, you need to talk to all sides.

Q Is it because it creates the appearance of impropriety or because it was actually impropriety?

A Both.

Q Okay. And I would have thought that it would be improper if Celeste was advocating for her position, talking about the substance of a finding, talking about the case. Isn't that the nature of what improper ex parte contact is all about?

A Yes. And I think that is part of what she did. Well, this is the -- you know, yes, the standard was wrong, and she told them what she advised, and he said he will correct it. I think that --

Q So you think that's a substantive ex parte contact that troubles you and you opine that?

A Yes. I think that it would have been very easy to copy counsel on that. They should have been apprised of that conversation.

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Q In fact, counsel for Muniz is the one who raised this in the first place; right?
A That's right.
Q And Celeste was transmitting the error that they raised to the hearing officer; right?
A Well, the way you say that, it was the hearing officer's error and they pointed it out.
Q Oh, yeah. I didn't mean it was their error.
A No, not their error.
Q She was delivering a message from these guys to the hearing officer, hey, you used the wrong burden of proof. That's what happened; right?
A Yes. And that was substantive in the fact that this is how we're going to deal with this error. It really should have gone to the Board. If they were going to make a decision that we're going to cut to the chase and just have them reissue the decision under the proper burden, all parties should have been in on that decision or at least given an opportunity to be heard.
Q Okay. But you believe if that would have gone up to the Board, in your experience in peer review they would have said to take this back and analyze this under the appropriate standard of proof; right?
A I think it's a possibility.
Q More likely than not?

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A Probably.
Q Yeah. I mean, the alternative is they would start over?
A Yeah. And so they don't want to do that.
Q That's not going to happen. Okay, that's the ex parte, I think. Is there any other part of the ex parte we haven't talked about that? Well, we need to talk about No. 9. You have a problem with No. 9 being added; right? We did hit on that.
A Yes, yes.
Q Talk to me about that.
A All right. The issue was the standard of proof, the burden of proof, okay. Not let's re-go over, you know, and add things that we found. And the standard was supposed to be lighter for Dr. Muniz.
Q Understood.
A Instead of doing that, you know, they didn't take anything off. Like on the ones where they found that it could have gone this way or that on the delay, they didn't say, well, the burden is on the MEC, and it wasn't real clear, let's take off No. 7, you know. That would have been reasonable given the change in the burden of proof that was made. What happened was the complete opposite. They said, oh, well, the burden changed, so let's add on some stuff, you know. They

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added a whole 'nother finding that they hadn't had before based on Lord only knows what. But I think my opinion is they were trying to bolster their opinion now that the burden had changed.
Q But you're speculating; right?
A I'm speculating. I'm giving my opinion.
Q Sure.
A But I think any attorney or any health peer review expert would see that as a problem. We're going to make it easier for this physician; but when they go back and review this, they come back with a harsher decision. You don't see a problem with that? Well, I know I can't ask questions. But that's a problem to me.
Q Does that violate the bylaws, adding No. 9?
A To the extent that it didn't follow the procedure that it was supposed to go to the hearing panel, yes. And I mean to the Board.
Q Other than -- well, we talked about that.
A Right.
Q But, I mean, adding -- assuming that reconsideration is going to be done, and we've talked about how that could technically be a violation.
A Right.
Q But if a peer review panel is reconsidering

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their findings, is there anything per se violative of the bylaws to change a finding, add a finding, remove a finding? It's all okay, isn't it?
A I don't think the bylaws address it that specifically. But they do -- there is an overriding issue of fairness.
Q We're talking about the bylaws right now.
A Well, even in the bylaws you're supposed to get a fair hearing, you're supposed to get notice, you're supposed to get all the due process that's entitled to go to them.
Q So while that may not violate a specific provision of the bylaws, it violates the fairness component of the bylaws, either inferred or expressed somewhere?
A That's correct, that's correct. Well, I don't think there's a bylaw that says you can't when you make a mistake go back and add something else.
(Whereupon, the deposition was briefly interrupted at this point.)
MR. DAYHUFF: Do you want to take a break?
THE WITNESS: Yeah, I could use a break.
MR. DICK: Yes.
MR. DAYHUFF: Let's take a break.
(Whereupon, a recess was taken from

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approximately 5:00 o'clock P.M. to 5:10 P.M.)
MR. DAYHUFF: Back on the record.
Q (By Mr. Dayhuff) We were talking about No. 9. And I think I understood your analysis on 9. Do you think adding 9 you're talking about -- you don't -- you're not giving expert opinions on what the evidence shows, you're giving peer review opinions, I know. And issues of fact, you're not giving opinions about what happened in the underlying medical thing. Do you think the addition of No. 9 is evidence that weighs in favor of the fact that they got together in some way to reconsider this? You've got a concern that they didn't get together to reconsider this?
A Yeah.
Q Doesn't the addition of a finding indicate that they probably got back together and said, hey, you know what, let's include this?
A No, because I think the draft was -- my understanding is this was written by the hearing officer.
Q So you think the hearing officer added that on his own?
A Right. And I don't know whether it was that subsequently they said okay. But if he added it, based on my experience, they are probably not going to argue

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with him.
Q But, of course, they have every opportunity to argue with him, don't they?
A Well, one would hope. But if he's writing the decision before he has deliberated with the panel, that's a big issue.
Q That's a big issue, okay. If the panel for some reason --
A You can't have the judge, who doesn't get a vote, write a decision and say: Here. Is this your decision? I've changed the burden of proof and added this finding of fact.
Q And that assumes that he hasn't had a conversation with them about what they want; right?
A That's right, all together deliberating after understanding the change in the burden of proof.
Q And we don't know what happened one way or the other?
A We can only go from what the evidence shows. The evidence indicates that the hearing officer drafted it before meeting or deliberating, whether telephonically or in person, with the hearing panel.
Q But that's not an expert opinion, a peer review opinion, is it?
A To the extent it goes to whether it was

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appropriate and whether this decision is faulty and the hearing was unfair, it's part of my expert opinion, is all I can say.
Q And I understand that you would -- if what you believe happened happened, you're using that as an element to support your peer review opinion.
A Right.
Q But you're not offering expert testimony that you know what happened by reviewing the documents with respect to how that corrected hearing report went down? That's not an expert area, is it?
A No, I don't think so.
Q It's a factual issue --
A A factual issue.
Q -- to be decided by the fact finder in this case; correct?
A Correct.
Q All right. Oh, the hearing officer, I think you said you didn't like the way he behaved during the hearing?
A Yes.
Q Tell me about that.
A These bylaws provide that -- and HCQIA says you can be represented by counsel or another physician or someone. And it gives a couple of different

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categories. These bylaws say that the -- that they can be represented by counsel, but counsel can't do anything, basically. So that's not unfair on its -- you know, by itself, in that it applies to both parties. But when you have a physician having to, you know, basically save her life or her livelihood having to act as an attorney on her own behalf, and then you have the hearing officer acting as counsel for the MEC, that just distorts the fairness completely. That just makes it a completely unfair hearing.
If you look through, and you can just tab through the transcripts, on the back they list who was examined by whom, you know, which witness was examined by Dr. DiBona and Dr. Robinson, and numerous, numerous times Mr. Nauful. I've been in a lot of hearings. The only time the hearing officers ask questions generally is to clarify something in the record. You know, did you mean this exhibit? Did you misstate -- you know, can you restate that? Do you understand this? Just to make sure that the process is fair to all of the parties in the room, not to examine a witness in a manner that gets testimony that's favorable to one party. And he does that, or attempts to, repeatedly throughout, and that's inappropriate.
Q What if the hearing panel has asked him to

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ask questions on their behalf?
A Write them down and give them to him?
Q Yeah. Is that okay?
A No.
Q That's not?
A I don't think so.
Q What if the hearing panel were to ask a question?
A The hearing panel can perfectly ask questions.
Q So the hearing panel could ask the type of questions that Mr. Nauful asked and it's okay?
A That's correct.
Q But if the hearing panel asked him or sent him a note to ask those type of questions, it's not okay?
A Without seeing it, my guess is, my hunch, my gut feeling is that no, it's not okay. The hearing officer should not be asking questions.
Q Tell me why it's not okay?
A Because he's acting, if you look at the record, he's acting as an advocate for one party. The type of questions and who he questions and the specific -- the specificity of the questions are all as if it's MEC counsel. It looks like, to follow your theme, that

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Celeste sent him the questions, here, ask these. And they're on completely -- you know, some of them are additional topics that the hearing panel hadn't even asked about, you know. So I think that's inappropriate. And it happens again and again and again. You know, it can always happen a few times, one or two questions here or there, but it's repeated throughout.
Q Because a hearing officer can ask questions; right? And I think you said that. It's not, per se, a problem for a hearing officer to ask a witness a question at a fair hearing?
A To clarify a point, not to prosecute a case.
Q Okay.
A Or defend. If he cross-examined all of the hospital witnesses in a manner that's favorable to Dr. Muniz, that's inappropriate. He's not supposed to advocate on behalf of any party. The fact that he did ask multiple, multiple questions in a manner that was favorable to the MEC and that he, you know, had communications with MEC's counsel ex parte shows that he just didn't understand his role. He was hired by the hospital, so I'm going to represent the hospital. And I don't know that he went that far in his thinking, but that's what you get when you review the record.

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Q In your experience the hearing officer is hired by the hospital all the time; right?
A That's right, the hospital, not the MEC.
Q Right. Well, you have no -- you don't believe, do you, that the MEC facilitated or was involved in Nauful's asking questions at the fair hearing, do you?
A He had a meeting with some of the MEC members. Didn't they have a prehearing conference where -- or not a conference but a meeting where representatives from the MEC and Celeste and the hearing officer were present and no one from Dr. Muniz's counsel was present?
Q Then you read the testimony about what occurred at that meeting; right?
A I'm sure I did.
Q Do you recall anything that would indicate to you that at that meeting Celeste used that as her opportunity to get Ernie Nauful to ask questions that would be favorable or helpful to her of witnesses? Did you see any indication of that at all?
A I don't believe so. I probably would have remembered that.
Q Yeah. If you did, that would have caught your eye?

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A Yes.
Q Now, let's assume for the sake of argument that Nauful shouldn't have asked questions. If we assume that, does it matter at all to your opinion that the MEC -- if the MEC had nothing to do with his decision to ask questions, does that affect your opinion? I mean, is it still unfair to you?
A It's still unfair because you have to look at the process as a whole.
Q Okay.
A That's kind of what the whole issue is. You have to look, once it goes all the way to the Board and the final decision, you have to look at the process all the way through.
Q Fair enough.
A And it doesn't really matter whether the MEC specifically asked him or he has friends on the Board or he just thought his role was to ask that or he didn't know and that's just how his questions came out. The fact is he asked a whole bunch of questions as if he were an advocate for the MEC, okay. That's not fair when Dr. Muniz can't have counsel in there. They didn't even do an opening statement.
Q They had counsel in there; right?
A Right, but they couldn't say anything.

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There's a quote in here that attorneys, aren't allowed to talk. And that's Nauful saying that at one point.
Q Well, attorneys were allowed to offer objections on evidence issues, weren't they?
A Right. Apparently so was Dr. Minto.
Q Well, they weren't potted plants; right?
A Well --
Q Well, David may have been.
A David, right.
Q But they were allowed, if something was going off the tracks, the attorneys for the MEC or the attorneys for Dr. Muniz were able to speak up and object, weren't they?
A Yes, in a limited extent.
Q Well, did you ever see them precluded from offering an objection they wanted to offer?
A I can't answer that question yes or no. There's a whole bunch of testimony.
Q There is.
A Sorry.
Q You mentioned the mother testifying was an issue for you or not?
A Yes.
Q Tell me about that.
A There wasn't any -- she wasn't listed on the

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witness list.
Q And because she wasn't listed on the witness list, that --
A Doesn't give --
Q Doesn't give notice?
A It's inappropriate. Goes against HCQIA and the bylaws.
Q All right. Would it matter to you, to that opinion, if the mother was -- that the MEC didn't know until testimony from other witnesses at the hearing, that they didn't know until that testimony was entered into evidence that they needed the mother to testify to clarify what they viewed as an inaccuracy in the record? Would that matter? And you can assume that hypothetically and you don't need to look at the --
A Well, sometimes it -- I tell my clients to look at the bylaws. And here it is highlighted that presiding officer shall not act as an advocate for either side of the hearing. But let me get to your point.
Q Check out the witness section.
A Right. I think they can amend, but they -- if it's -- these bylaws are similar -- if they give, you know, sufficient notice. And I don't think that was the case here. Well, sorry. Actually, here it is.

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Ask your question again. Sorry.
Q You offer the opinion that allowing the mother to testify without providing her name in the initial hearing notice is unfair, inappropriate; correct?
A That's correct.
Q Okay. My question to you was if you assume that the MEC didn't -- couldn't have known the need for this witness, the mother, until after evidence offered at the hearing, i.e., Muniz or other witnesses making statements about her daughter's desire to have a transfer or not have a C-section or what-have-you, if they couldn't know until that evidence was entered that her testimony was necessary, does that change your opinion about the unfairness or the impropriety of allowing her to testify?
A Actually, that specific fact, one way or another, the bylaws allow for the parties to amend their witness list, but it has to give -- provided that notice of the change is given to the other party. And that would assume in here, as in all the notice provisions, enough to allow the other side to do something about it, you know. Now, hey, we're going to call her right now.
Q How much notice would you say is

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appropriate?
A Well, they knew of the mother, and that she was an issue, and the patient. They could have put her in originally. I think your issue of saying they somehow didn't know, I think that's --
Q I'm asking you to assume that.
A Well, you could come up with any fact pattern that said, oh, yeah, maybe under this scenario.
Q Okay. Well, I'm asking you as an expert under my scenario, assuming what I say is true, would that change your opinion?
A The MEC didn't know -- all right. Let's just say the MEC wanted to amend its witness list. I think that both parties can amend their witness list, provided they have enough notice. And it doesn't say exactly how much notice.
Q Sure. That's a separate issue. My question is assuming that the MEC didn't know the need for Mom to come testify until they heard other witnesses at that hearing. Does that change your opinion about whether Mom needs to be on the initial notice? And I'm asking you to assume --
A Well, that's why you would amend your witness list, is you learned something new. So I think we might be agreeing.

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Q Okay. So that would change your opinion, but you would like to see an amended witness list?
A You have to notify the other side. You don't show up and say I'm going to call this person or I'm going to do an affidavit.
Q In any particular form or as long as there's notice?
A It says amend their witness list.
Q Okay. Could you amend the witness list through an email? Why not?
A Why not? That's how we all live.
Q Yeah. I mean, you could amend the witness list through an email, could you not?
A It doesn't say one way or another. Theoretically, yes, if everybody is in agreement to it. But counsel was not in agreement. He vehemently was opposed to the issue.
Q We're not talking about whether they wanted Mom to testify or not, we're talking about notice.
A Right.
Q Could you have --
A But you talked about the form of notice.
Q Yeah.
A The formality of it.
Q So you're saying if I was Celeste and I sent

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David an email about Mom testifying, he could object to the form of that notice and that objection be a valid one?
A I don't think that the two of them by email can resolve the issue. I think the hearing officer has to be there. It has to be appropriately amended. Whether it's, you know -- okay.
Q Resolve the issue of whether she gets to testify or not?
A Right, right.
Q No, I understand that.
A Okay, I'm sorry. Maybe that's why we're going at it with --
Q I'm just talking about the notice.
A Yeah.
Q The bylaws say you've got to amend your witness list --
A Oh, I'm sorry, I was focusing on --
Q -- and my question was could you do that amendment through a phone call; how about that? Could you do it through an email? As long as there is notice provided, it's okay, isn't it, the notice part?
A The notice part? But, then, well, how do you know -- I mean, if you say, oh, I called Adrienne and told her, but I never got that call, I don't think

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notice is appropriate, you know what I mean. So I think that's an issue. I think it has to be real clear that everybody got notice.
Q All right. If --
A For it to be appropriate.
Q -- counsel for Muniz admitted that they knew of Celeste's desire to call Mom days before they were going to call Mom, is that notice?
A Yes.
Q Okay. Now, to the issue of whether she should have testified or not. Do you have an issue with Nauful's decision to allow her to testify, or not, or is that within his discretion?
A Well, there was strong objection.
Q There was.
A Very strong objection. And the hearing officer can control how the hearing proceeds.
Q The mode and method of the hearing; right?
A Exactly.
Q So do you have a problem with his decision that was entered over the objection of Muniz's counsel to allow Mom to testify? Does that violate some peer review principle?
A It does not violate any specific provision that I know of, but I think it goes to the fairness of

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the hearing. So, you know, it doesn't say you can't, you know, amend the bylaws or you -- I mean, amend the witness list.
Q Do you view that decision, that decision, to be unfair?
A How much notice was given?
Q I don't know. How much notice would you require to be given such that it wasn't unfair?
A Several days if you're going to call the patient's mother, I mean.
Q Several days?
A Yeah.
Q All right.
A I mean, especially since -- well, weren't there gaps in time between this hearing?
Q I think so.
A Yeah.
Q Of course, Dr. Muniz would have the right and the ability to cross-examine Mom once she is called; right?
A Yeah. And how much legal training did Dr. Muniz have? And she didn't have the benefit of the hearing officer helping her.
Q She had her counsel with her, didn't she?
A Who wasn't allowed to speak.

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Q They were allowed to talk to her; right?
A Yes.
Q And assist her with her cross-examination if she so desired; right?
A Beforehand. But I don't think during the hearing, as a practical matter, you can get a full cross-examine that an attorney would ask versus what a physician would ask.
Q Okay. So you believe that attorneys are better at cross-examining than physicians; right?
A I would hope. Although, I must say that these physicians did very well.
Q Did pretty good?
A Yeah. I was real impressed, all of them, on both sides.
Q And I understand that opinion.
A From a legal point.
Q And I just want to make sure that Dr. Muniz would have access to her counsel for assistance --
A Uh-huh.
Q -- With questioning at the hearing; right?
A I would hope.
Q Okay.
A And the MEC had the hearing officer and their own counsel.

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Q We've got that opinion.
A I just want to make sure you didn't miss that one.
Q Oh, no. Competitors voting and deliberating, I have as No. 4, and assisting the MEC I guess is the issue?
A Yes.
Q Talk to me about that.
A And I've got to get these names straight, because there's Boone, Boehner, DiBona. And I have this little cheat sheet. Do you have my little cheat sheet with all the names on it?
Q Is it that chart you had?
A Yes.
Q Okay, you have your chart you were looking at.
A And I don't want to misstate who is who. All right. Boone, Boehner, and Minto are partners. And Bana -- no, Boehner and DiBona both serve on the Board; is that correct? Do I have the names right? I know two of them do. And I know you're not going to answer me, but that's what I'm looking for.
Okay, here we go. Dr. Boehner is chairman of the Board and he is also an OB and he helped prosecute the case against Dr. Muniz. And, you know,

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this might be something I have to further support, because I don't have the minutes with me, but my understanding in looking at everything that I've looked at is both Dr. DiBona and Dr. Boehner, who partook in presenting the case, also participated in the final decision by the Board. And Dr. Boehner, as I understand it, is a competitor.
Q Okay.
A Okay. And I believe I read that he did not vote, that he recused himself for the actual vote.
Q At the Board?
A At the Board. But he did not recuse himself from the meeting and the deliberation. That's not what it says.
Q We can assume that for purposes of your opinion today; how about that?
A All right.
Q So you would have a problem if Dr. Boehner, the chairman of the Board of the hospital, voted and/or deliberated about this matter? That would be a problem for you; right?
A Yes.
Q About Dr. Muniz's peer review, okay.
A That's right, because he also participated in presenting it.

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Q And that was my next question.
A And he's her competitor.
Q So because he is her competitor and because he participated at the fair hearing level?
A Yeah. It's like me going in and being a witness against you at trial and then I turn around and I get to be the judge too. That violates all concepts of fairness.
Q Does that violate the bylaws?
A If he voted, yes.
Q And does that -- well, does HCQIA address that at all?
A Yes, it does.
Q In what respect?
A To the extent that any of the decision-makers -- well, the fact that he's a competitor, he's allowed to present, you know, and oppose them or be a witness, but he's not allowed to be in on the decision.
Q All right. And that's pursuant to HCQIA?
A HCQIA.
Q I understand that. Any other competitors/prosecutor kind of issues that you have? That's got to be it. You just told me that it's okay for Boehner to present at the fair hearing or be a witness at the fair hearing; right?

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A That's right.
Q So it would also be okay for Minto, a competitor, an OB, to present at the fair hearing or be a witness at the fair hearing?
A Yes.
Q Okay. And I don't think Boone did, but if Boone --
A No, I don't think he did.
Q -- an OB competitor presented at the hearing or was a witness at the fair hearing, that's okay?
A Right.
Q All right. I've got my next one, unless you have anything else on the competitor issue, lack of attempt to take intermediate action.
A Yes.
Q Talk to me about that.
A Without belaboring the decision again and all of the faults we found on that, the difference between the notice and what they actually found on what they said they were going to try her on and what their findings were, I think it's clear and my expert opinion is when you read the record, all the correspondence, the hearing transcript, the decision and how it went up through to the Board, that the hearing panel who heard all the evidence backed off considerably on their

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concerns, on the concerns that were originally raised with respect to this case, you know, whether she recognized an emergent situation, whether there was a delay, and the medication issue. The medication issue was dropped completely. After hearing testimony it was like, fine, since several maternal-fetal experts said that was perfectly fine, they, to their credit, dropped that as an issue. And they dropped off and said, you know, well, the delay, they didn't make a specific finding that there was a clear delay of a certain time and that it even affected the ultimate outcome, all right.
Q Okay. This dropping down, dropping off, however you described it, there's nothing wrong with that, is there?
A No, no, that's what I'm saying. And thank you, that brought me around. I forgot where I was going, quite frankly. I was going to say that I had a point here. But intermediate sanctions, it's questionable when you have one case -- and I perfectly understand whenever you have a death that it's reasonable to look at the case, okay. They could have done normal peer review, questionable, and we can argue all day whether precautionary suspension, whether there was imminent harm. I would say no and you would say

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yes. But that's a gray area.
But the sanction for that one case, given the testimony -- well, even if you look at the record even before you get to the testimony, the sanction of summarily suspending this physician's privileges and medical staff membership is so overboard from what the testimony supported. The testimony of their own witnesses was, you know, one of them said that I might have done it sooner and the other one said I wouldn't have done it sooner and I thought it was within the standard of care. I mean, there was a whole bunch of testimony from the MEC's own witnesses that Dr. Muniz's care was not outside the standard. So to take away her privileges on that ground is way beyond what was necessary.
If they thought, look, and what they basically found, when you look at the decision, is, you know, we can't believe what this woman said, she is fighting for her life, we don't know if she said this right or this right, and she misstated this word, which had nothing to do with the substance of the actual care provided. And we don't know whether she can work with people. You know, they could have used the disruptive physician policy. They could have sent her out to be-nice school, which they do to a lot of physicians. You

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know, they could have reprimanded her, made her get counseling, a whole manner of things. But instead they completely destroyed her career. And I think the failure to do that puts into question the whole fairness of this hearing.
Q Let me ask you a few follow-ups on that. Sounds like if you were on the hearing panel, you would have made a different decision after review of that evidence; right?
A That's true.
Q Okay. You would have chosen a different sanction or remedy or solution other than revocation; correct?
A That's correct.
Q All right. What I'm struggling with is isn't that -- isn't that in the discretion of the panel, the physician peers, to make that decision?
A But it has to be based on the evidence.
Q All right.
A All right?
Q I hear you.
A You have to look at what they found fault with, what they thought was the problem with this physician's care, and what they ended up deciding after hearing all the evidence and based on their evidence

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what they eventually did. The Board, as the final determiner, should consider all of that as well.
Q And they did?
A Uh-huh.
Q And they decided in their discretion revocation was the answer; right?
A Yeah. And the chairman of the Board was the one waving the flag through the whole process. Where's the fairness in that?
Q Under your assumption that he participated in the --
A He was at the meeting, unless the meeting minutes are incorrect.
Q All right. So, let's see, different sanction. What sanction would you have chosen?
A Assuming which facts?
Q The facts as you know them.
A I don't agree with the facts that they find. If they really found that, you know, we don't think she can get along with people, send her to counseling, send her to be-nice school, a 29-day suspension. You know, get her attention. She has already spent a ton of money, you know, to get through this process. And, I mean, I'm not pointing fingers at him (indicating), but for any one of us in this room it would have been a ton

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of money.
MR. DICK: I'm a lot cheaper than you two, I'll tell you.
THE WITNESS: That's just a nice way of saying you're younger.
MR. DAYHUFF: Thanks a lot.
Q (By Mr. Dayhuff) Well, let me ask you this question. In the short time I've had to take a look at your outline, your outline recognizes and I would imagine you would not dispute --
A What outline? Oh, that was for --
Q Something.
A That's not for this case, you know.
Q I know not this case. This is more of a general question.
A Okay.
Q The decision to take a case into corrective action versus the disruptive physician policy.
A Right.
Q Those are two different avenues; right?
A That's right.
Q And it's up to the MEC if they want to take it into corrective action or if they want to refer this to administration to take it under the disruptive physician; right?

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A That's right.
Q I mean, there's nothing wrong with choosing which avenue you go down; right?
A That's right.
Q All right.
A But you asked me which sanctions.
Q I did.
A So that's where that came in.
Q I got you. Now, I think I've got a few more questions for you, but I think --
A And can I just add one thing on the decision?
Q Sure.
A You had asked me about peer review and the purpose. The whole purpose of peer review is to improve the quality of care, you know.
Q Right.
A Not to destroy physicians' careers. There was a whole lot that could have been done to address any concerns, valid or not, by this or any participant in this hearing process, that could have addressed the concerns and not destroyed this person's career.
Q So you disagree with the sanction that was chosen; right?
A That's correct.

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Q There's nothing in the bylaws that makes that sanction that was chosen inappropriate, is there?
A Well, it has to be -- yeah. I mean, the standard of proof. There has to be credible evidence. I believe it was arbitrary and capricious.
Q Well, you're not an expert in determining whether there was credible medical evidence or credibility of the evidence to make a decision, though; right?
A No. I base that on reading the record and my 25 years of experience.
Q Just like I could read the record or David could read the record and weigh evidence; right?
A You asked me my opinion, and that was it.
Q That's not an expert peer review opinion, that's a me, Adrienne, reading that record and deciding what I think about that evidence, medical evidence, by the way, but evidence; right?
A No, not necessarily, because you have to look --
Q What peer review standard do you apply to make that decision about the weighing of the evidence?
A It's the bylaws standard.
Q Which bylaws standard does that violate?
A It says you have to do it -- where's the

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bylaws? Actually --
MR. DICK: There's the bylaws (indicating).
A (Continuing) Well, it wouldn't be this exact standard because they agreed to a modified one. But it was, you know, the grounds for the decision can't be arbitrary and capricious.
Q Okay. So you -- okay.
A And that's both --
Q So you looked at the evidence and decided that the grounds for their decision -- well, that they acted arbitrarily and capriciously based on your review of the evidence?
A The recommendation based on the evidence, yes.
Q Okay. And I guess what I'm asking you is how is that a peer review opinion? Isn't that like you as a fact finder or you a medical weigher of evidence, I mean?
A I think it's a crossover. I think if I'm here testifying as a peer review expert, I've looked at the standards and I've looked at the evidence and considered the process, and with all of the peer review hearings I've been in and the research I've done, and that I'm giving my opinion based on that. So I think we can just agree that's what it is.

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Q All right. Let me ask you a few others.
A Sure.
Q Peer review, internal hospital trials, there are a lot of elements in those that are very much like kind of a civil trial; right?
A That's correct. Quasi-judicial, I believe.
Q Quasi-judicial. The concept of -- and we've talked a little bit about this. The concept of making objections, contemporaneous objections, applies in internal hospital peer review, right, at hearing?
A Yes, to the --
Q And let me make it more concrete.
A Yeah.
Q If you're sitting there as hospital counsel, like you are 30 times in your career, and physician's counsel raises an issue or brings in a piece of evidence and you have a problem with it, you need to make a contemporaneous objection if you want to hope to exclude it; right?
A I think it would be prudent. But I don't think you can say -- I think what you're trying to say is that the Rules of Civil Procedure apply, and they don't. I mean, they clearly say that the evidentiary rules don't apply.
Q Sure, sure. What I'm saying is a little bit

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different. I agree that the Rules of Civil Procedure don't apply and the evidence rules are more broad in peer review.
A Exactly.
Q But if you've got a problem with something someone is about to testify to or offer into evidence, don't you believe that you're required to make that contemporaneous objection or it comes in; right?
A Oh. Yeah.
Q All right. If you have a problem with the hearing panel members --
A Right.
Q -- you have an obligation as counsel for the physician or counsel for the MEC to make an objection to the hearing panel member?
A And I think that was done in this case.
Q Before the hearing; right?
A Right.
Q Okay.
A When they put Dr. Toomer on the hearing panel and he was a participant in the matter.
Q And they objected timely and the person was removed; right?
A Yeah. And then they called him as a witness. Very incestuous.

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Q Nothing wrong with calling him as a witness, is there?
A No, no.
Q Good. Question for you: If Dr. Muniz and her counsel had a problem with Ernie Nauful as hearing officer, they needed to make a contemporaneous objection to have him removed, did they not?
A If there was something before the hearing started that they knew about, you know, say, oh, you know, he's married to some -- you know what I mean?
Q Married to Celeste Jones?
A Yeah, exactly.
Q Okay.
A Or to the witnesses.
Q I'm talking about during the hearing. Because what we have is an allegation that this guy is asking questions that are too MEC friendly. Don't -- doesn't Dr. Muniz have the obligation, or her counsel, to object when that happens and say: Hold on. You can't ask these questions; that's not right.
A And how's that going to help her?
Q It's going to be -- well --
A You know what I mean?
Q I know what you mean, but --
A As a practical matter.

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Q I know what you mean. You're worried about the strategery involved in that kind of an objection; right?
A Right.
Q But that's their call; right?
A Or the ultimate effect.
Q And that's their call, isn't it? And by "their," for the record, I mean Dr. Muniz and her counsel.
A Right.
Q You and I have been there too when you make a decision to object or not based on how it's going to affect everything; right?
A Right.
Q But that's still our call, isn't it?
A Yes. But still --
Q They could --
A Go ahead.
Q They could have objected if they felt that Dr. Ernie Nauful -- well, not Dr. but Mr. Ernie Nauful was asking questions that were favorable to the MEC, they could have objected and they didn't; right?
A I don't believe they did. I mean, you know, I haven't memorized it, but I don't recall that.
Q The question is they could have; right?

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A Yes, they could have.
Q Sure, they could have. And by not objecting, for whatever reason, it's just like letting in that piece of evidence, now it's in and it's too late to raise that now?
A I don't think so.
Q Why not?
A Because what you're doing is looking at the whole process, okay. And the fact that he acted this way during the hearing and then all the irregularities with respect to the ex parte communications and forgetting to do the proper burden of proof, and then the questions regarding how the corrected report was done, all of those you have to look at. And that wasn't known until after the fact.
Q And I understand what you're saying, you still don't let my friend Mr. Nauful off the hook for what happened later. My question is more narrow, though. If they wanted to stop the questions that he was asking during the hearing, don't they have an obligation to make a contemporaneous objection to stop those; otherwise, they have waived that complaint?
A I don't -- I don't know, to tell you the truth. I can't say absolutely that there is a specific standard that says that they waive, you know.

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Q What does your experience tell you with respect to hearings that you have been in 30 years? If you don't make a contemporaneous objection, you waive?
A Well --
Q That's the way the world works?
A The bad act comes in, okay. So the bad act occurred. And I will give you that they did not object during the hearing while the hearing is there, but who knows what the questions would have become after that. But you have to look at all of the actions of the hearing officer.
Q And I'm not -- I'm not even talking about the totality of the stuff.
A And I gave you your point, but you have to acknowledge mine.
Q Just so I'm clear on my point, absent a contemporaneous objection, you can't raise later the questions he asked as a grounds for unfairness?
A I disagree with that.
Q Really?
A Yeah.
MR. DICK: And I object to form.
A (Continuing) On the whole reasons that I just said. And there's not a standard that says that in the bylaws or HCQIA. What I will agree with you on

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is if they didn't object to it and it came in, it's in the record, okay. That's where we agree.
Q All right.
A But I don't think we're precluded to say, look at this guy, he didn't give us a fair hearing. Look at all these things he did. That's one of the things.
Q And I guess I would say you've got the obligation to take the steps when you see it happen or, otherwise, you've waived. But you disagree?
A I understand that's your position.
Q But you disagree with that position?
A Yes, to the extent -- yes. And I think the record reflects what my opinion is.
Q Fair enough. Do you know whether Aiken Regional Medical Center is a public institution or not?
A I believe it's a for-profit owned by UHS.
Q All right. And if it's a for-profit owned by UHS, the Fifth Amendment of the Federal Constitution, the Fourteenth Amendment of the Federal Constitution, and the due process clauses in the South Carolina Constitution, do those apply to my client?
A I don't believe so. However, those concepts are --
Q You don't believe so or, no, they don't

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apply?
A I don't believe so is the strongest.
Q Okay. Why do you not believe that?
A Because they're not a public entity, they're private.
Q Right, and constitutions apply to public entities?
A Exactly.
Q Okay.
A However, if you look at the whole line of nonprofits that have been reorganized, there's mix in the case law whether they call them public or private. And there's a whole bunch of public institutions that still have to abide by those criteria. So --
Q Whole bunch of private institutions?
A Public.
Q Public, okay.
A You know, open to the public. And that's -- I'm getting off my area of expertise. This is going back to law school.
Q Isn't it?
A Yeah.
Q And maybe I can short-circuit it and say this: You wouldn't opine, in fact you would disagree with an opinion that due process applies to a private

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institution?
A I'm sorry, say that again. I just beamed out.
Q You don't believe due process, the notion of due process, as in constitutional due process, applies to a private entity, do you?
A Not as a constitutional process. But here we have two different sets of standards that are applying that, for lack of a better term, can be summarized by due process, the Medical Staff Bylaws and the Health Care Quality Improvement Act.
Q Well, let me make it more specific then. You couldn't assert a legal claim against a private institution for violation of the due process clauses in state or federal constitutions, could you?
A I have not researched that issue. I'll give you that I don't think so, but I haven't researched that issue.
Q Fair enough.
A And I don't want to opine on it one way or another.
Q Well, you know, while I've got somebody to opine, I might as well chat with you.
A That's not a peer review. Well ...
Q Does a private hospital's acceptance of

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Medicare and Medicaid funds turn it into a public institution?
A I am hesitating because I think there is something to that. But I can't cite you anything, so I am going to say I don't -- I am not positive on that.
Q Okay.
A Because there's a whole bunch of criteria, like EMTALA and there's a whole bunch of criteria that apply to private hospitals by virtue of the fact that they get Medicare and Medicaid.
Q Is the --
A So --
Q I'm sorry.
A Go ahead.
Q Okay. Is the violation of hospital bylaws, in a peer review process, does that constitute a violation of the Health Care Quality Improvement Act?
A It could, I mean, to the extent that they have very similar, you know, notice, adequate notice, adequate hearing, you know, all of the rights in the hearing. So they mirror each other to some extent.
Q To some extent they do, but you could certainly violate the hospital bylaws and still be found by a court to have complied with the HCQIA standards?

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A That's correct. I believe that to be correct.
Q Are medical staff bylaws in your opinion a contract between a physician and a hospital?
A It depends on what state you're in. I -- I'm sorry, go ahead and ask that question again.
Q Do you believe that medical staff bylaws are a contract between a physician and a hospital?
A I know that it's been argued and adjudicated differently in multiple -- in a variety of opinions.
Q What's Georgia's?
A I don't believe it's a contract.
Q How about South Carolina?
A That I don't know. I'll know by the time I -- I'll tell you when I know the answer.
Q Question about the burden of proof. You mentioned that you talked about the original burden of proof in our bylaws putting the burden on the physician. You've done a lot of work with medical staff bylaws. Have you drafted medical staff bylaws provisions that placed the burden of proof on the physician in a peer review matter?
A Yes.
Q And nothing wrong with that?
A No. Just got to follow what's in the

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bylaws.
Q Okay. So you could have that kind of burden you were talking about, you, physician, must prove by clear and convincing evidence that the MEC's decision was arbitrary and capricious, and that's okay?
A I've never put that in a bylaws. I think that's overreaching.
Q What do you put in there?
A Preponderance of the evidence. And usually -- well, in this case it's a little bit different. The way the burden is stated, it really seems to be talking initially about credentialing and whether they should have privileges, you know. So it's a little bit of a different issue. I think it's the clear and convincing on the physician by itself. I think a lot of physicians don't read their bylaws before they vote on them. And they wouldn't do that, frankly.
Q Just so I'm clear, though, bylaws that would place the burden of proof on a physician in a peer review matter are okay in your opinion, your peer review opinion?
A If voted on and adopted by the medical staff and approved by the Board.
Q And they wouldn't run afoul of the Health Care Quality Improvement Act?

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A That's correct.
Q Okay. Your opinion about the decision made by the hearing panel, this idea that they got the evidence wrong and they got -- well, they got the findings wrong and they got the sanction wrong, right, in summing that up?
A Uh-huh.
Q There are -- well, setting aside your opinion that that was the wrong decision on the evidence that you reviewed --
A Uh-huh.
Q -- setting that aside --
A Right.
Q -- was their decision one that was still within the realm of reasonable, despite your disagreement with it, or --
A Yeah, I'm not sure I can separate that.
Q -- or was it unreasonable? There's a continuum?
A Right.
Q We can have a disagreement that's reasonable.
A Right.
Q You know, the color of David's tie is blue, gold and green or blue, golden rod and navy. That's a

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difference, okay?
A Right.
Q But if I were to say that's red, orange and purple, that's a difference that's not reasonable; right?
A That's right, unless you're colorblind.
Q Right. So my question is: I know you disagree with the findings here.
A Right.
Q Setting that aside, is this reasonable or unreasonable?
A It's unreasonable to the extent it's not based on the evidence. And that kind of bleeds into it.
Q That's where you're going then?
A Yes.
Q So you're saying this isn't an issue about one over which reasonable minds can differ, these findings; right?
A Right.
Q That's what you're saying?
A Ask your question again. I'm sorry.
Q You're saying that these findings are not in the category of reasonable minds can differ and your opinion is these are beyond the pale, unreasonable

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findings; right?
A No, I wouldn't necessarily say that.
Q So is this that reasonable minds can differ? You believe they're wrong, but reasonable minds can differ?
A I think reasonable minds can differ on anything, you know.
Q Not on blue, green, gold and orange, purple, red; right? That's not reasonable.
A But that's not the standard we're going by. The standard is credible evidence.
Q I'm asking a question about reasonableness right now.
A Well, I don't know how you get to that. I can't -- I guess, I can't separate that from being credible evidence to support what they've done.
Q Okay.
A And I'm not trying to be difficult, I just really can't --
Q Well, here's the question, and tell me however you feel about it.
A Okay.
Q These findings, setting aside your position that they are wrong, is it going to be your opinion or would you say that these are, that these findings are

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unreasonable, it was unreasonable for this panel to make these findings, or are these findings issues about an issue of reasonable minds can differ? And that was inartful, but you know what I'm asking.

A Yeah.

Q Do you think these are unreasonable, the findings in the hearing panel decision?

A The findings --

Q And I know you disagree with them, but are they unreasonable?

A The fact that they found this? I'm sorry, I'm really struggling, but maybe it's because it's late, because I don't think -- here's the problem with your question, as I see it. These aren't purple and red versus golden rod and navy, okay. They're are they supported by credible evidence. And if they're not supported by credible evidence, they're not reasonable. That's the way my mind thinks about it.

Q I hear you.

A And so I'm sorry if that's not answering your question.

Q Are you familiar with the Substantial Evidence Rule in administrative procedures?

A Right, right.

Q Okay. If a trial court or the hearing

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officer, whoever it is, makes a decision on facts and that's appealed, the legal errors are, you know, it's de novo. If there's a legal error, you can reverse it.

A Right.

Q But if it's a finding of fact, Substantial Evidence applies, right, the Substantial Evidence Rule?

A Right.

Q Which means what? What's the Substantial Evidence Rule?

A Are you talking about the Any Evidence Rule?

Q Right.

A Yeah.

Q Okay. If there's any evidence in the record upon which a reasonable mind could come to the conclusion that the trial court came to, it can't be reversed; right? That's the way findings of fact work and the Substantial Evidence Rule works; right?

A Right. I mean, that's what the standard says.

Q And I'm trying to take it into your credible evidence position.

A Well, that's a different standard to me. I thought you were just asking do I think it's reasonable, you know.

Q Okay.

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A And under the --

Q Well, would these be upheld, these factual findings in the recommendation, could they be upheld under the Substantial Evidence Rule that we've just discussed?

A Not if there was a thorough review of the record.

Q Okay. So your opinion is is there is not evidence in the record upon which a reasonable mind could look at it and come to these conclusions?

A That's correct.

Q Fair enough. All right. And what was the second part? The sanction. Same question on the sanction.

A Yeah.

Q Is there evidence in the record that a reasonable mind could look at and come to the conclusion that revocation is the answer?

A Yeah, that's actually more to my point. I'm sorry, I --

Q That's all right.

A Go ahead and ask that question again. I think I already answered, in my mind.

Q And you may have. Is it that you believe that -- you know, when thinking about the sanction, you

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know, the decision-makers at the hospital said revocation is the answer. And I know you disagree with that, okay. But the question is: Is there evidence in the record that a reasonable mind could look at and say revocation is the answer?

A No.

Q Okay, no, okay.

A And that's stronger, much stronger. Like on some of these, I understand your point, you know, on some of the individuals. But when you look at the entire decision and what they decided to do as the sanction, I don't have any qualms saying no, that's unreasonable.

Q Okay.

A And that's my opinion.

Q Do you have an opinion whether the peer reviewers at Aiken undertook this peer review in the reasonable belief that the action was in the furtherance of quality health care?

A We have to kind of break that down. In complete fairness, I think that whenever you have a death of a patient and they're going to investigate and look into it, that's in the furtherance of health care. I think that's okay.

Q All right.

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A But after going through all of the hearing and all of the evidence and the parties who participated in the decision-making and the hearing, I think that it was not based on the furtherance of quality of care. As I understand it, and I read somewhere that --

Q Okay. And --

A Wait. And let me just say, because this goes to why I say that, that this hospital needed more OBs. In fact, they were recruiting for more OBs. That's not in the furtherance of quality health care to kick somebody off when the evidence shows that termination of privileges aren't supported. Or isn't supported, excuse me.

Q Okay. I'm going to kind of walk through the HCQIA factors. First one we talked about, the reasonable belief that the action was in the furtherance of quality health care, if I understand you correctly, you have a problem down the line on the HCQIA factors. Like ultimately, after you've investigated everything, you seem to have a problem. But at least I think I heard you say that instigating this investigation was in the reasonable belief that it was in furtherance of quality health care?

A I think it's arguable. I don't think it --

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Q You wouldn't opine that they did not act when they instigated this in a reasonable --

A To do a chart review and all of that, no. I don't have any problem with that.

Q To start a peer review action, okay.

A To start. And, well, you have the whole issue of when does a peer review action start.

Q Do you believe they engaged in a reasonable effort to obtain the facts in this matter?

A No.

Q Why not?

A And I meant to bring that up, I'm sorry. This is one of the other ones. They did not question Dr. Bryan, who was the assistant surgeon in the C-section matter.

Q Any other reason that it wasn't a reasonable investigation other than that?

A I'm trying to think, because there were several -- well, I think that's it.

Q Okay. It doesn't matter to you, then, apparently, that Dr. Bryan testified at the fair hearing where his observations and testimony could be elicited? Does that assuage your concerns about the investigation?

A A two-part answer. And that's kind of the

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problem with these whole things when you look at HCQIA, what part of the process are you talking about. HCQIA says you're supposed to make a reasonable investigation into the facts, okay. Before they summarily suspended, means they already acted, she doesn't get a right to a hearing until she is already losing money, losing patients, patients are being put at risk. They did not talk to the surgeon in the room who observed the surgery and who was there in the -- by the desk on the L & D floor. So I think they did not investigate appropriately.

Q All right. And the fact that he testified at the fair hearing doesn't change that opinion?

A No, because by that time they had already made a recommendation to terminate. Then if you look at his testimony, his testimony doesn't support recommendation of terminating privileges. So not only did they not go get it before they made a recommendation, when they heard his testimony, they ignored it.

Q Discovery in an internal peer review matter, discovery isn't permitted in a hospital peer review matter, right, discovery like we talk about discovery in a civil action?

A It's really -- it depends on what the bylaws

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say.

Q Right.

A And I usually give almost anything that I can because I, public or private, go under due process. Due process them to death, is my advice. So if it's something that's related to the hearing that's not protected by -- I won't give out other physicians' records. But if it's related to the hearing and was relied on, yes.

Q Why won't you give other physicians' records?

A Another physician's records?

Q Uh-huh.

A Peer review records?

Q Uh-huh.

A Because it's not relevant, A; and it violates that other physician's case.

Q Okay.

A The fact that a hospital took action or didn't take action, that type of information can be discussed. But pulling all this and -- say there was a separate hearing on Dr. Jones, okay. I don't think it's appropriate to pull in that peer review material into another peer review material.

Q Okay.

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A Data regarding fetal deaths, you know, other types of statistical data, or the fact that they kicked this physician off staff not by name, I think it can come in and is appropriate.
Q So you would keep the identity of the physician secret?
A That's right.
Q And statistical information that doesn't identify anybody you are okay with?
A Right. Like the normal peer review type information, the quality assurance information, you know, how many delays in OR, how many injuries, you know, that type of thing.
Q What if it breaks that down by physician, would you provide that?
A Yeah, redacting the names.
Q What if there were only three physicians?
A Still, as long as they were redacted, yeah.
Q It wouldn't concern you that you were revealing protected --
A Statistical information like that? I would -- I certainly -- I think if you look at the case law, it clearly says you have to -- well, the latest case I'm talking about is a Georgia case. So I don't know if --

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MR. DAYHUFF: Steady, David.
MR. DICK: Sorry.
THE WITNESS: And I'm sure that's an issue between y'all.
MR. DAYHUFF: You're getting David excited.
THE WITNESS: Yeah.
Q (By Mr. Dayhuff) All right. And --
A But that's always an issue. And I've been on the MEC side and they say, well, so and so, and you're not supposed to bring up other physicians.
Q Let's say you had three -- or let's say you had four OBs on staff. You would provide data that lists, you know, complications or whatever else on those four OBs, but you would just redact their names?
A Uh-huh.
Q And you would think that would be sufficient to protect the peer review?
A Yeah.
Q Okay.
A And that's not an opinion. That's not -- that's information that is tracked by the hospital. That's not a physician -- the whole point of peer review is I'm a physician and you're a physician, you messed up, I'm supposed to be free enough to feel like I can write a bad report on you or at least have it

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looked at without, you know, recrimination.
Q And I guess it depends on how that and for what purpose that information is collected too, right, as to whether it's producible or not?
A Well, it's -- it's --
Q I mean, if it's part of the peer review system at the hospital --
A Well, I've played that game before too. But it's usually through the QA Committee or Performance Improvement, because they change the name every few years, that creates that data. The peer review process is generally, in most case law that I'm familiar with, is the hearing process, the notice, and those types of things, not the collection of data that applies to all physicians.
Q And the peer review privilege or applicability of the privilege is a state-by-state thing, isn't it?
A That's correct.
Q With case law in each state that interprets the various statutes that are different?
A That's right. But there's not that many cases. They look at cases all over the country. When you look at any of those cases, they rely on other courts.

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Q Do you know if South Carolina courts have ever cited a peer review case from any other state?
A I'm sure they have. And I don't know of any, but odds are.
Q Is it normal for a hospital to require execution of a release before providing information to other hospitals about a physician's privileges?
A Usually when you sign onto the medical staff and sign your application, it says that.
Q Have you ever been in the position of advising hospitals about responding to credentialing inquiries from other hospitals?
A Yes.
Q All right. You don't advise them that a release is a good idea before they send out information about a physician?
A You usually -- it's usually attached.
Q Okay, yeah. But there's a release; right?
A Yeah.
Q But you would -- well, that's fine.
A Because that's what the application says, I release you and you have the ability to inquire from other hospitals and everything.
Q Okay. These opinions that you have offered me today -- and we talked about this at the beginning

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of this, I guess, a little bit -- the standards you are applying for me today are the Medical Staff Bylaws and your understanding of the Health Care Quality Improvement Act; right?

A Uh-huh.

Q All right. The Health Care Quality Improvement Act is a legal standard, is it not?

A Yes.

Q All right. So are your opinions that relate to the Health Care Quality Improvement Act legal opinions?

A To the extent -- well, to the extent they -- well, you've asked me -- I'm here to testify as an expert on peer review. And part of that on peer review is understanding the case law, the Medical Staff Bylaws, and the HCQIA immunity provisions, which, whether it's legal or not, for HCQIA they are applied in the bylaws, so you have to look at them. And I think it's appropriate to opine on them, whether they were followed or not.

Q Well, I'm not -- I didn't ask you whether it's appropriate to opine on them or not. I asked you whether when you are opining about whether a peer review action complies with HCQIA, isn't that at its heart a legal determination?

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A I believe it is.

Q Okay. Same question with the bylaws, when you're opining --

A And I'm not trying to sweat you all out of here.

Q Okay. When you are opining about whether a peer review action complies with the bylaws, isn't that at its heart a legal opinion or conclusion?

A I guess because I'm a lawyer it's a legal opinion. I don't know.

Q You are, after all, a lawyer.

A Yeah. I'm not sure how to answer that entirely.

Q Well --

A Because I'm being asked to opine on the bylaws and whether they were followed or not from a peer review perspective. So I think it can be both. To the extent you can separate my opinions from legal to peer review -- well, I think they're kind of combined, I guess is what I'm saying.

Q So the opinion about whether something complies or not with HCQIA is a legal opinion. The opinion about whether -- correct?

A Whether it complies? I'm going to the "I believe so," is what I said.

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Q Well, you said "yes" a moment ago, so --

A No, I said "I believe so."

Q And you can change it if you want to.

THE WITNESS: Didn't I?

THE COURT REPORTER: (Court reporter nods head up and down.)

THE WITNESS: Thank you, Madam Court Reporter.

Q (By Mr. Dayhuff) All right. So you believe when you opine about whether a peer review process complies with the Medical Staff Bylaws, that's a combination of legal conclusion and what? Seems like there were two parts.

A Well, to the extent -- I guess I'm not saying this very clearly. The HCQIA immunity issue I believe is a legal issue. Well, I guess all of this is. I guess peer review is a legal issue, to the extent that you look at it in the big picture. So --

Q Why do you say that?

A Well, it all goes to whether it was followed. I mean, I'm not sure I --

Q Whether rules are followed; right?

A Right, right.

Q Any other reason that it's legal in nature? Whether statutes are followed?

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A Process, statutes.

Q Process? Due process; right?

A No, the process.

Q The process?

A That complies with the bylaws, notice, adequate hearing, all of the criteria that's set forth in there.

Q And tell me if you agree with this. If we were talking about a public hospital, wouldn't you also have whether the conduct violated due process?

A Yes.

Q And that's certainly legal?

A I've seen that argued. Yes.

Q So that's why, those reasons we have just discussed, are why you believe this is at heart a legal issue?

A I guess I'm not sure what your question is. At heart? We're all sitting here in a legal forum. I'm not sure I fully understand your question. It might be the heat and the --

Q Well, I'm near the end of this.

A -- and the time of day. And I'm not trying to be obtuse.

Q And, believe me, I'm near the end.

A I just don't want to state something and go

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why did I say that, because I'm really not clear. I apologize.

Q Well, take a moment. The fundamental question I'm getting at is, you know, what is the nature of these opinions? We discussed the standards you applied at the beginning of this.

A Uh-huh.

Q And you told me about the bylaws and you told me about the Health Care Quality Improvement Act.

A Right.

Q And I understand all that. When you're offering opinions about whether the peer review process complies with the bylaws or complies with the Health Care Quality Improvement Act, I believe those to be, at heart, at their heart, opinions about legal issues. Do you agree?

A Only to the extent that if we can agree that fairness is a legal issue. I think that's a -- I can't -- I don't think that fairness, when you look at the big picture in all of this, can be separated from HCQIA or the bylaws, the whole purpose behind the bylaws.

Q Fundamental fairness?

A Right.

Q Okay. So we throw that in. That's like a standard for you, then?

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A Yeah.

Q Okay, fundamental fairness, the Health Care Quality Improvement Act, and the Medical Staff Bylaws are the standards by which you are judging the peer review action in this case?

A Yes, I believe that's fair.

Q And at the heart of those three components is a legal determination, a legal issue, fundamental fairness, compliance with the Health Care Quality Improvement Act, and compliance with the Medical Staff Bylaws?

A I don't know, quite frankly. I'm not sure I can say.

Q Okay. What other kind of issue would it be?

A Well, to the extent -- that's the problem, I don't know what else it could be. But it sounds from the way you're questioning that, well, it's not this, it's that.

Q Well, take a moment. This is probably my last question. Think about it.

A Okay. At the heart of it, is it a legal standard?

Q Yes.

A Is that what we're saying? I don't know. I mean, I don't know how that answer is being used, so

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I'm not clear on --

Q It doesn't matter.

A Then my answer is I don't know.

Q I mean it doesn't matter how the question is being used. The question matters.

A That's what I'm saying. My answer is I don't know.

Q The Health Care Quality Improvement Act is a statute; right?

A That's correct.

Q Whether something complies with a statute or not is a legal issue?

A Yes. And we have already said that.

Q And Medical Staff Bylaws are rules?

A That's right.

Q Rules agreed to between the medical staff and the hospital, I guess?

A Uh-huh.

Q As to how things are going to be governed at the hospital; right?

A That's correct.

Q All right. Whether or not something complies or not with the Medical Staff Bylaws, is that a legal issue or determination just like whether you comply with a statute is a legal determination?

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A I guess my problem is -- well, yes, but it's based on the facts and the evidence. It's not just a pure legal standard.

Q Sure. And so is HCQIA. HCQIA is based on the facts and the evidence, right, and you look at all of that.

A Right.

Q So it's a legal determination too; right?

A I just really don't know.

Q The last part of your testimony is this idea of fundamental fairness. Whether something or not is fundamentally fair or not, that at its heart is a legal issue or a legal determination. We call it due process if this were a public entity. We're calling it fundamental fairness because due process doesn't apply to a private entity. But at its heart that's a legal determination; do you agree?

MR. DICK: Objection to form.

A No.

Q (By Mr. Dayhuff) Okay. Why not?

A Well, because I think it's -- I think the legal conclusion, after you look at the facts may be a legal conclusion, but I think the fundamental fairness applies -- it's a finding of fact as well and a legal conclusion.

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Q Okay. So after you analyze the facts of whether something is fundamentally fair or not, you would make a legal conclusion about fundamental fairness? That's what you're doing; right?
A I'm not making the conclusion. I'm offering my opinion.
Q You're offering an opinion about whether something is fundamentally fair and that opinion, at its heart, is a legal one?
MR. DICK: Object to form.
A Well, I think we have -- I think it's a combination, is the best I can answer.
Q (By Mr. Dayhuff) It's a combination of legal and factual?
A Uh-huh.
Q I'll take that, okay.
A Okay.
MR. DAYHUFF: And I just need to review these notes and I think I'm done.
(Whereupon, a recess was taken from approximately 6:30 P.M. until 6:35 P.M.)
MR. DAYHUFF: Back on the record.
(Whereupon, Defendant's Exhibit No. 8 was marked for identification.)
Q (By Mr. Dayhuff) Could you identify for the

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record our last exhibit, which is in front of me.
A Yes. That's Exhibit 8. This is an outline that I prepared for my portion of a presentation that was given to the DeKalb Medical staff in 2004.
Q Now, this is kind of just a general kind of wrap-up question. I'm obviously here to hear all of the opinions you plan to offer at trial. Do you have any other opinions that we have not hit upon that you plan to offer at trial?
A None that are known at this time. And I just say that because -- and I don't expect more, but I don't believe so.
Q And if you do come up with new opinions, that will result in us having to do this again. And not here, by the way.
A You can't threaten me. I can change my mind if I need to. But we will certainly let you know.
MR. DAYHUFF: Great. Dave, do you have any questions?
THE WITNESS: In all due process and fairness.
MR. DICK: Fundamental.
THE WITNESS: Fundamental fairness, right.
MR. DICK: Okay, I just have a few questions. I know you thought you were all done,

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didn't you.
DIRECT EXAMINATION
BY MR. DICK:
Q Just to harp on Travis's last point -- and I will try to go quickly through this.
A Sorry. I feel ignorant.
Q I understand. It's a confusing topic. HCQIA has a lot of kind of arbitrary language in it, doesn't it? You know, the furtherance of health care, reasonable efforts, you know, things that are not concrete and I guess what I would consider arbitrary. Is that correct?
MR. DAYHUFF: Object to the form of the question. Go ahead.
A You mean -- well, I'm not sure I would say arbitrary. I would say non -- not specifically defined or broadly worded. There's a word I'm looking for, and it's not coming to me now. So that's what I would say. There's a lot of gray area.
Q (By Mr. Dick) Gray area, okay. And are those gray areas -- and I guess what I'm trying to ask is are those areas gray because they are used to determine whether or not a hearing would be fair?
MR. DAYHUFF: Object to the form.
A Yes, I think that's exactly right. That's

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the whole point. And I think that's what I was trying to say earlier when I said that it's fundamental fairness -- and that's my word -- is strewn all throughout HCQIA and the bylaws.
Q (By Mr. Dick) So would it be fair to say that, as Travis said, you know, he was saying that the heart of HCQIA and the bylaws was a legal question, but really more the heart of HCQIA and the bylaws is a fairness question?
MR. DAYHUFF: Object to the form of the question.
A I believe that you can't determine whether HCQIA was complied with or not unless you address the fairness issue.
Q (By Mr. Dick) Okay. And is the fairness issue something that in your experience in your, I think, 22 plus years in the hospital health care section and in your 30 plus peer review cases that you have been involved with, is that something your experience would help you determine?
A Yes. I mean, that's -- yes.
Q All right.
THE WITNESS: And let the record reflect opposing counsel is chomping loudly on the witness's lunch.

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MR. DAYHUFF: I apologize.
MR. DICK: Is this a distraction tactic?
MR. DAYHUFF: No, I'm starving.
Q (By Mr. Dick) And I don't know what exhibits they are, but Travis showed you the notices, the three notices that there were.
A Yes.
Q And he asked you if they complied with HCQIA. Looking at the final determination that was made by the hearing panel, the Board of Governors, and then looking back at those notices, do you think those notices complied with HCQIA?
MR. DAYHUFF: Object to the form of the question.
A No.
Q (By Mr. Dick) Ernie Nauful made the determination that Dr. Muniz's cross-examination questions would be considered testimony and evidence. Do you think that was appropriate?
MR. DAYHUFF: Object to the characterization as evidence.
A No. And I should have said that. That's grossly inappropriate. First they make this woman -- they take her career away, they make her act as a lawyer on her own behalf, and then they use her what

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sometimes were ill-formed questions against her as if she were testifying. I think that was inappropriate.
Q (By Mr. Dick) As far as you know, was there ever an amended notice issue?
A I did not see one. And I looked through everything that was given to me.
Q And Travis harped on this for a while, so I will just ask it.
MR. DAYHUFF: Object to the characterization of my questions as harping.
Q (By Mr. Dick) I just want to ask this to make sure we're clear. By counsel for Dr. Muniz hearing testimony that was conflicting, do you believe that that put Dr. Muniz or her counsel on notice that she was being terminated or her privileges were being terminated based on her lack of candor or credibility?
MR. DAYHUFF: Object to the form of the question.
A No, not at all.
Q (By Mr. Dick) And this is just kind of an opinion question. But you told Travis that you believe that if it had gone up to the -- sorry. That if the incorrect burden of proof standard report that was issued had gone up to the Board of Governors, they would have likely rejected it, turned it around and

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sent it back to the panel for reconsideration; is that correct?
A That's my best guess. I believe that.
Q Do you think the panel would have taken the reconsideration more seriously if it had come via the proper procedure and straight from the Board?
MR. DAYHUFF: Object to the form of the question.
A Yes, actually, I do. Yes, I do. The manner that it was handled made it like, oh, we're just going to correct this typo almost, you know. That's what I got from reading the record.
Q (By Mr. Dick) Looking at the corrected hearing report, Exhibit No. 7 -- and you really probably don't have to look at it for this question. I'm just referencing it for the record. Do you believe that -- well, I guess in your expert opinion do you believe it was a violation of HCQIA and the Medical Staff Bylaws to list as a reason for her termination her inability to work with the medical staff in No. 9 of that corrected report?
MR. DAYHUFF: Object to the characterization of evidence in the record.
A (No response)
Q (By Mr. Dick) Let me step back and ask it

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in a two-part question. Prior to this Exhibit No. 7 was Dr. Muniz ever noticed about her ability or I guess the questions regarding her ability to work with the medical staff?
A Not that I saw. And, in fact, a fair amount of the testimony was favorable or indicated that she did work with the nurses and, you know, other physicians well.
Q Was it a violation of -- well, I guess in your expert opinion was it a violation of the bylaws and HCQIA to include that as a reason for a finding of the panel without providing that notice?
A Yes. To the extent it wasn't noticed to her, yes, I believe it was inappropriate.
Q And that just goes to your expert opinion that proper notice wasn't provided to Dr. Muniz?
A That's right.
Q Travis asked you a whole lot of is-it-possible questions, so I figured I would ask you one. Is it possible that Celeste used her ex parte communications with Ernie Nauful, the hearing chair, to influence his questioning or opinions?
A It's certainly possible.
MR. DICK: Off the record.
(Whereupon, a discussion ensued off the

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record.)
Q (By Mr. Dick) As far as the --
A Let me just say that I just can't stress enough how inappropriate those communications were. That's just very inappropriate.
Q You talked a lot about the witness list and the fact that the mother was never on the original witness list and that, you know, it could have been amended.
A Uh-huh.
Q So you've got, I guess, the first hearing -- and I guess as you know, the hearing took place in two separate time periods.
A Right.
Q One time period being June 28th and 29th, and the subsequent being August 17th, middle of August.
A Middle of August.
Q If during the first two days of the hearing, June 28th and 29th, the MEC discovered that they needed to call the mother as a witness, in your expert opinion would it have been appropriate for them to immediately after that hearing list her as a witness or send an amended notice or inform counsel that they were intending to call her as a witness?
MR. DAYHUFF: Object to the form of the

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question.
A Yes. I mean, the whole point --
Q (By Mr. Dick) And if they waited up until right before the August 17th date, would that be inappropriate?
A Yes.
Q And why is that?
A Because it goes against the whole point of fairness to all the parties.
Q In your 30 plus cases regarding peer review, has a chairman of the board ever presented a case against a physician?
A No.
Q Does that seem odd to you?
A Yes. It may be less odd if the Board was the original decision-maker. You know, the Board can take action on its own. And maybe that would be reasonable. But not in an MEC case. It should be the MEC's recommendation what they're doing. And to me, just having the prosecutor -- it's the same person being the prosecutor and the judge.
Q How about has any Board member at all ever participated in the prosecution of a physician at a panel hearing?
A Not at any of the hearings I've been in on.

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Q If Dr. Minto, who is a competitor of Dr. Muniz, were to participate and vote on her termination at the MEC level, would that be appropriate?
A At the MEC level?
Q Uh-huh.
A That's a decision-making -- well, let me check something. I don't want to misstate something that fundamental. Where is my HCQIA?
Q If you don't know offhand, you don't need to -- just say "I don't know."
A Well, I do know, but I'm just -- I don't want to say the wrong thing. Ask the question again. I'm sorry.
Q Okay. You stated it was okay for a competitor to participate in the prosecution of Dr. Muniz at the hearing panel level.
A That's right.
Q Right?
A Right.
Q And we know that's okay because you said it was okay for Dr. Boehner and Dr. Minto as competitors to be at the --
A As witnesses.
Q Yes, as witnesses or prosecutors at the

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hearing panel level. But is it appropriate for Dr. Minto as a competitor to participate in and vote at the MEC level on her termination?
A I guess I'm struggling. I believe HCQIA says -- they're talking about the decision-makers with respect to the hearing panel. And that's what I -- if I had it before me, I could be more clear on this point. But I think what's making me hesitate is in every case that I've had when there's a competitor on the MEC, they recuse themselves from the vote.
Q Okay. So in your experience the competitors at the MEC level always recuse themselves?
A Yes.
Q What about have you ever had a competitor participate in the prosecution of a doctor at the hearing panel level?
A I've never -- in all the hearings I've done, there were counsel representing and actually doing all the legal work. So I didn't have a physician actually asking the questions. But I've always had like a member of the MEC sit with me and advise me, and I've called them as witnesses, whether they were competitors or not. That's okay. They shouldn't be making the decision. They can offer evidence. Especially in a lot of the small hospitals you might only have a few

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OBs.
Q We talked about that HCQIA requires you to make a reasonable effort to obtain the facts, but doesn't HCQIA also require that you act accordingly on those facts?
A That's exactly right. And that's a huge part of the problem in this case. First, they didn't gather all the facts. And then when they did, they didn't follow the evidence.
Q So was it a violation of HCQIA, then, to terminate her privileges based on these facts?
A I think it's more whether it was a violation, to answer it how I can answer it, it's a violation of HCQIA in not giving her appropriate notice, not giving -- you know, acting in the furtherance of quality health care, all of those factors.
Q I mean, in HCQIA aren't you required to, I guess -- well, I don't have it in front of me.
A And I had it here just earlier. Oh, no, those are the decisions.
MR. DAYHUFF: I can look through if you would like. I'm going to ask you about that.
THE WITNESS: Well, I had it and I might have -- can we take a real quick break? I just

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had it in my hands a little while ago.
(Whereupon, a recess was taken from approximately 6:50 P.M. until 6:55 P.M.)
Q (By Mr. Dick) What I was asking you about, and I phrased it not very well, but HCQIA -- and this is, I guess, 42 USC 11112, Section 4, requires that a professional review action must be taken in the reasonable belief that the action was warranted by facts known after such reasonable effort to obtain the facts and after meeting the requirements of paragraph 3.
In your opinion was termination of Dr. Muniz's privileges an action that was warranted by the facts in this case?
A No, it was not.
Q And why is that?
A Because they basically brought charges against her -- and I say charges, their grounds were based on three or four factors. And they found that those factors weren't really supported by the evidence and they went on additional factors that were related to her personality and credibility that she wasn't noticed on.
Q Okay.
A And all the additional flaws that we have

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talked about throughout the afternoon, you know, the procedural irregularities.
Q You testified that the questioning by Nauful was inappropriate because I guess it showed bias and showed that he was not being impartial. And you said that, you know, in your experience sometimes a hearing officer asks one or two or three of those types of questions, I guess, in --
A More of a clarification, you know, like someone -- like the wrong document was cited or they misspoke or, you know, something to get the hearing back on track. Not substantive questions.
Q And I guess my question to you is is it possible to not recognize that the hearing officer is being biased until you look at the record as a whole and observe all of his questions together?
MR. DAYHUFF: Object to the form of the question.
A I believe that's correct. And I almost said that earlier. That, you know, in the heat of the moment when he is asking two or three questions at a time -- and sometimes he asked two or three, but a lot of times he asked several, you know. But if you look at the volume of the questions that he asked and the pattern, he really developed a pattern throughout

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that's -- and, you know, you couldn't have known that until you're through with the hearing and calmly reviewing the transcript.
Q (By Mr. Dick) Right. And that pattern couldn't be discovered until the end of the hearing?
A That's right.
MR. DAYHUFF: Object to the form of that question.
Q (By Mr. Dick) So is it appropriate for counsel to object to Mr. Nauful -- well, let me rephrase that. Was it appropriate for counsel to object to Mr. Nauful after the hearing on the appeal of the hearing panel report?
MR. DAYHUFF: Object to the form of the question.
A I see what you're saying. Yes.
Q (By Mr. Dick) Could counsel for Dr. Muniz have objected to Dr. -- sorry. Could counsel for Dr. Muniz have objected to Mr. Nauful's ex parte communications if they didn't know about them?
A No.
MR. DICK: Okay. I think that's it.
MR. DAYHUFF: And I have just a couple of follow-ups to make sure the record is clear.
RECROSS-EXAMINATION

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BY MR. DAYHUFF:
Q Dr. Boehner's participation at the hearing, fair hearing, is not inappropriate -- well, it is appropriate; isn't that true? I mean, there's nothing wrong with his participation?
MR. DICK: Object to the form.
A Dr. Boehner?
Q (By Mr. Dayhuff) Dr. Boehner, the chairman of the Board. There was some discussion about what the chairman of the Board could and couldn't do. I just want to make it clear that I -- I understood your opinion to be that Dr. Boehner, a competitor of hers, can participate in the fair hearing, competitor and chairman of the Board, can participate in her fair hearing and it not run afoul of the bylaws or the Health Care Quality Improvement Act?
A As a witness?
Q Presenter or witness. Right?
A I don't know about presenter. But I assume that that's correct, yes.
Q Well, I think that's what you testified to earlier, that competitors of hers could present or be witnesses at the fair hearing. Is that right?
A I know or I think I said witnesses, because that's all I've ever observed.

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Q All right. Well, what about presenters?
A I don't believe that that's specifically prevented.
Q Okay. Now, what I understood you to have a problem with is if Dr. Boehner voted and deliberated at the Board level; right? That's what you had a problem with?
A Right, right.
Q Okay. Because he participated below and because he was an OB competitor; right?
A And a Board member.
Q Right, right.
A Yeah.
Q And I just wanted to make sure I understand what your opinion is.
A Yes.
Q It's that if he voted and deliberated at the Board, that's where the problem lies?
A Yes.
Q Because of his prior participation and because he is a competitor?
A That's correct.
Q Okay. David asked you about Dr. Minto's participation at the MEC level in this matter. No. 1, do you know whether or not she voted at the MEC level

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in the 2010 period?
A Not without looking at the minutes.
Q And the question he asked you was more specific. It was is that a violation of the Health Care Quality Improvement Act for Dr. Minto to have voted at the MEC level. And you have had time to take a look at the Health Care Quality Improvement Act. Do you see anything in that statute that would preclude Dr. Minto from participating at the MEC level or find that to be improper?
A Let's see. It's kind of spread out over a couple. There's one that specifically says a competitor can do this or that. This one has all the stuff, okay.
Q I'll tell you what I'm familiar with. Under Section 3 it talks about the notice and the hearing; right?
A Right.
Q And it goes down and kind of describes things that should and shouldn't happen. And the only place I'm familiar with that mentions competitors is with respect to serving on the hearing panel.
A And that's what I said.
Q Okay. So --
A I said that's what I remembered. And that's

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why I hesitated.
Q And that's why you wanted to check, I've got you. So after you checked, isn't it true that Dr. Minto's participation at the MEC level, if she voted -- and let's assume that she did -- that would not run afoul of the Health Care Quality Improvement Act?
A That's correct.
Q All right. Let me ask you this question: You guys discussed this idea of whether in the heat of the moment an objection could have been made to Mr. Nauful's alleged bias in this matter; right? Do you recall that?
A Uh-huh.
Q And I think you said, well, you know, it might not have been apparent until reviewing the entire transcript. Right?
A That's correct.
Q Well, let's assume -- well, then I assume you would say that the time to make that objection to Mr. Nauful as a hearing officer would have been after getting the transcript, reviewing it, you could make your objection then; right? After reviewing the entirety of the transcript it would then become apparent, if it wasn't before, that he was biased and

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you should make your objection then; right?
A Yes.
Q Okay. And if you don't make it then, would you agree with me that you have waived that objection? You didn't agree with me before that you would have waived, I don't think.
A Yeah.
Q If after reviewing that whole transcript and you don't make an objection, then would you have waived that?
A No, I don't think so.
Q Really?
A Because it's part of a whole, you know. One part of it is whether you actually object to something, is what we were talking about in the hearing, and then the issue of seeing it all, that might have made you think, man, I wish I would have objected to that. But what we're complaining about is all of these factors put together.
Q Okay.
A The fairness. And you have to look at all of the evidence.
Q All right. How about waiting until the hearing panel decision comes out to make the objection, is that too late, to the hearing officer's alleged

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bias?
A Well, they didn't have all the discovery. They didn't know about the ex parte communications. I don't think it was waived, is the short answer.
Q All right. Because of the later ex parte communications?
A The knowledge of that.
Q Absent the ex parte communications could they have raised it or was it too late?
A Could they have raised it? Yeah, they could have raised it.
Q Validly raised it?
A I don't think they waived it.
Q Okay.
A I don't think that -- I don't think they waived it, is my opinion.
Q When a judge looks at this case, she is going to apply the Health Care Quality Improvement Act to --
A Right.
Q -- this peer review, isn't she?
A She should.
Q And when she decides whether or not it complied with the Health Care Quality Improvement Act, she will be making a legal determination, won't she?

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A Yes.
MR. DAYHUFF: Okay. No further questions.
THE WITNESS: That's what judges do.
MR. DAYHUFF: Absolutely.
MR. DICK: Just a couple of quick follow-ups.
REDIRECT EXAMINATION
BY MR. DICK:
Q You said that Dr. Boehner as a competitor had the ability, you know, according to HCQIA and the bylaws, to participate in the hearing panel prosecution of Dr. Muniz. As the chairman of the Board of Governors, do you think that that was appropriate for him to do?
MR. DAYHUFF: Object to the form of the question.
A No, I don't. I think -- no, I don't.
Q (By Mr. Dick) Dr. DiBona was the lead prosecutor for the MEC in the hearing panel --
A Yes.
Q -- and then participated in and voted at the Board of Governors level. Was that inappropriate?
A With respect to fairness, yes, I think that was inappropriate. But -- well, yes.
Q Would that be a violation of the process

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that we've been talking about to have somebody repre -- someone act as a prosecutor and then vote at the next level, the Board of Governors level?
A It's not -- you can't look in there and it's not like the provision that says you can't be a competitor and be on the hearing panel, okay. And, actually, let me look at it again. Sorry.
MR. DAYHUFF: And please don't eat during the deposition.
MR. DICK: Well, I'm hungry now.
A (Continuing) All right. And I can't think when I'm hot and hungry. Hang on. I just want to look at the verbiage one more time. Well, I'm sorry, I'm just going blind. Where did it go? There we go. And I am blind. I skipped over it three times.
Ask your question again. Dr. DiBona what?
Q (By Mr. Dick) Well, I will ask you this. Did it violate the fundamental fairness of this process to have Dr. DiBona serve as the prosecutor of Dr. Muniz and then vote and deliberate at the Board of Governors level?
A I believe so. I think his presence as prosecutor and leading the charge, you know, had to have carried the day or have significant influence on his other Board members.

MR. DICK: No further questions.

FURTHER RECROSS-EXAMINATION

BY MR. DAYHUFF:

Q Did Dr. DiBona's conduct violate the Health Care Quality Improvement Act?

A I'm looking at the specific provision, and that's what I wanted to double check. It pertains to the conduct of the hearing and notice and discusses the hearing panel, so it's silent on the Board members.

Q Right. So there's nothing in the Health Care Quality Improvement Act that could be pointed to to say that DiBona's participation as described by Mr. Dick violates the Health Care Quality Improvement Act?

MR. DICK: Object to form.

A Well, it says after adequate notice and hearing procedures are afforded to the physician involved or such other procedures as are fair to the physician under the circumstances. I think you can argue, a strong argument can be made that those circumstances weren't fair to the physician.

Q (By Mr. Dayhuff) All right. Does the Health Care Quality Improvement Act speak at all about participating at different levels?

A No. And that's what I answered. Not

specifically.

Q And all you need to do is comply with the standards set forth there to have HCQIA immunity; right?

A To comply with HCQIA you have to comply with HCQIA. Yeah, I think that's fair. I just want to make sure I understood the question.

Q You mentioned that Section 3 was meaningful to you on that question, adequate notice and hearing procedures provided to the physician or after such other procedures as are fair, okay. And it defines adequate notice and hearing procedures below, does it not?

A Well, I wouldn't say it defines everything. Isn't there some soft language around there that says that these can be? Let's see. It says the health care entity is deemed to have met the adequate notice. It doesn't say you absolutely have to do all of these things.

Q You are deemed to have met prong 3 if you do what is beneath the section called Adequate Notice; is that correct?

A Yes, that's what it says.

Q And under that section there's no prohibition on what Dr. DiBona did in this matter; is

that correct?

MR. DICK: Object to the form of that question.

A I think that's correct, if I remember your question correctly.

Q (By Mr. Dayhuff) My question was after you read through adequate notice and hearing procedures that defines adequate notice and hearing procedures in 3, is there anything in that section that would prohibit DiBona from undertaking the conduct he did in this peer review action?

MR. DICK: Object to form.

A I don't see anything that specifically addresses that point.

Q (By Mr. Dayhuff) My question was is there anything that would prohibit or find fault with what he did?

MR. DICK: Object to form.

A That's what I'm saying. One way or another, there's nothing that addresses it.

Q (By Mr. Dayhuff) Well, if there's nothing that addresses that as a flaw, then if you --

A I think that's a legal conclusion.

Q I do too.

A No, your question.

Q Oh.

A You want to argue from what my answer is. I think I've answered your question.

Q Well, let me just make sure. You say nothing in -- you said nothing in subsection (b), adequate notice and hearing.

A That's what you asked.

Q Right. Nothing in there prohibits DiBona from doing what he did in this matter?

MR. DICK: Object to form.

A I said nothing specifically addresses that.

Q I guess I can live with that. Thanks.

MR. DAYHUFF: That's all the questions I have. Thank you.

MR. DICK: Nothing further.

(Whereupon, the deposition was concluded at approximately 7:15 P.M., after 4 hours 45 minutes of testimony.)

SIGNATURE OF DEPONENT

I, the undersigned, ADRIENNE E. MARTING, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony with the following corrections, if any:

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ADRIENNE E. MARTING

C E R T I F I C A T E

STATE OF GEORGIA:

DEKALB COUNTY

I, Catherine B. Steele, do hereby certify that the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

This, the 18th day of August 2011.

_____

CATHERINE B. STEELE

GA CCR B-1123

DISCLOSURE

STATE OF GEORGIA:

COUNTY OF DEKALB:

Deposition of ADRIENNE E. MARTING

Pursuant to Article 10.B of the Rules and Regulations of the Board of Court Reporting of the Judicial Council of Georgia, I make the following disclosure:

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CATHERINE B. STEELE, GA CCR B-1123. DATE: 08/12/2011

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